93-503

No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WILLIAM M. LIPS,
Petitioner,

v.

COMMANDANT, UNITED STATES
DISCIPLINARY BARRACKS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Date: September 28, 1993

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QUESTIONS PRESENTED

1. Whether an Article III judge—who grants a petition for a writ of habeas corpus on finding that a serviceman's constitutional rights were violated at his court-martial—erred in considering the writ because a military court "fully and fairly" considered the constitutional issues and found no error.

A. Whether an Article III judge—who grants a serviceman's petition for habeas corpus on finding that the prosecutor's extensive references to the serviceman's post-arrest silence during *cross-examination* and *closing argument* constituted plain error—erred in granting the writ because a military court "fully and fairly considered" the constitutional issue and found no error.

B. Whether an Article III judge—who considers a serviceman's petition for habeas corpus alleging he was denied due process of law at his trial because specific intent evidence, that is, evidence of motive, intent, plan, and design, was improperly admitted to prove general intent crimes—erred in considering the writ because a military court "fully and fairly considered" the constitutional issue and concluded that specific intent evidence was admissible to prove general intent crimes.

LIST OF PARTIES

Plaintiff-Petitioner is William M. Lips. Defendant-Respondent is the Commandant, United States Disciplinary Barracks.

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PETITION FOR A WRIT OF CERTIORARI

William M. Lips petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered on July 1, 1993. The United States Court of Appeals for the Tenth Circuit reversed the opinion and judgment of the United States District Court for the District of Kansas which (1) granted William M. Lips' petition for a writ of habeas corpus and (2) ordered that William M. Lips be retried within 120 days.

OPINIONS BELOW

On *September 1, 1984*, at Hahn Air Force Base, Germany, William M. Lips was convicted by a general court-martial of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. Sec. 920 (1988); forcible sodomy in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. Sec. 925 (1988); and aggravated assault (three counts) in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. Sec. 920 (1988). He was sentenced to a dishonorable discharge, 20 years' confinement, total forfeiture of pay and allowances, and reduction to the rank of airman basic. On direct appeal, the United States Air Force Court of Military Review affirmed Lips' conviction and sentence on *May 2, 1986*. *United States v. Lips*, 22 M.J. 679 (AFCMR 1986). The decision appears in the Appendix at 21a. The United States Court of Military Appeals denied discretionary review on *March 2, 1987*. *United States v. Lips*, 24 M.J. 45 (CMA 1987). The denial appears in the Appendix at 20a. On *April 17, 1987*, the United States Court of Military Appeals also denied William M. Lips' petition for reconsideration. *United States v. Lips*, 24 M.J. 203 (1987). The denial appears in the Appendix at 19a. On August 13, 1987, the Judge Advocate General of the Air Force denied William M. Lips' motion for a new trial.

On *October 27, 1988*, while confined in the United States Disciplinary Barracks at Leavenworth, Kansas,

William M. Lips filed a petition for a writ of habeas corpus under 28 U.S.C. Sec. 2241 (1988) in the United States District Court for the District of Kansas naming the Commandant of the Disciplinary Barracks as the defendant. In his petition for habeas corpus, William M. Lips alleged (1) that the military judge improperly admitted certain sexually explicit materials at trial; and (2) that the prosecutor violated his right against self-incrimination by referring to his post-arrest silence during *cross-examination* and in *closing argument*.

On *July 31, 1992* the United States District Court for the District of Kansas granted William M. Lips' petition for habeas corpus holding that the prosecutor's repeated comments on William M. Lips' post-arrest silence resulted in a violation of his constitutional rights under the Fifth Amendment of the Constitution. *Lips v. Commandant, United States Disciplinary Barracks*, —— F. Supp. —— (D.C.K. #88-3396, July 31, 1992). The decision appears in the Appendix at 9a.

On *July 1, 1993*, the Circuit Court of Appeals for the Tenth Circuit reversed holding that the District Court erred in granting habeas corpus relief on the grounds that the petitioner's constitutional rights were violated by improper prosecutorial cross-examination and closing argument. *Lips v. Commandant, United States Disciplinary Barracks*, —— F.2d —— (10th Cir. #92-3359, July 1, 1993). The decision appears in the Appendix at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 1, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) (1988).

STATUTES INVOLVED

Article 120(a.), U.C.M.J., 10 U.S.C. Sec. 920(a) (1988) Rape and Carnal Knowledge

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife,

by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

Article 125, U.C.M.J., 10 U.S.C. Sec. 925 (1988)
Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Article 128, U.C.M.J., 10 U.S.C. Sec. 928 (1988)
Assault

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

STATEMENT OF THE CASE

A. Facts

In June 1984, William M. Lips was a Senior Master Sergeant (E-8) serving on active duty in the United States Air Force and was assigned to the 50th Civil Engineering Squadron at Hahn Air Base, Federal Republic of Germany. He had been stationed at Hahn Air Base for over eight years and he and his wife lived off post.

On June 2, 1984, William M. Lips talked with Cynthia Carite at the Foodland grocery store on post where she was employed. In conversation he invited her to his home for dinner on June 4, 1984. He also mentioned to Cynthia Carite that his wife was out of the country at a child care seminar in Texas. William M. Lips and Cynthia Carite had known each other for some time and she and her husband had been to Lips' home and had socialized with him and his wife previously.

At 5:30 on the evening of June 4, 1984, Cynthia Carite arrived at William M. Lips' home. Upon entering the house, she removed her coat, took off her shoes, and stood in front of the fireplace. William M. Lips testified that he offered her a drink and that they watched part of a Clint Eastwood movie he was preparing to tape. He also showed her a .357 magnum pistol he had borrowed from a friend which is like the one used in the movie. In the kitchen Cynthia Carite picked up a copy of *Penthouse Variations* and began to page through it. She read aloud from one of the articles. She giggled and they began to talk about "kinky sex." (R. 897).

While dinner was cooking they returned to the living room. Cynthia Carite complained about her low-paying job. Lips commented jokingly, "I know where you can get a part-time job that pays a hundred dollars an hour . . . I'll take the first twenty minutes." Cynthia Carite laughed and said, "I've been told I'm sitting on a gold mine." (R. 899-900). Cynthia Carite then stood up, undressed herself, and walked over to William M. Lips. William M. Lips testified that it was Cynthia Carite who initiated this activity and the sexual relations that followed. They discussed "kinky sex" further and participated in some bondage sex.

They dressed and then returned to preparing dinner. While the steaks were cooking in the fireplace she fixed herself another drink and teased him about tying lousy knots. After dinner, they watched a film for twenty or thirty minutes and then went upstairs where they engaged in further sexual activity. When they finished, Cynthia

Carite asked William M. Lips if he had enjoyed himself and if he knew of anyone who was "a senior NCO . . . mature . . . not young, [who] had money, [and] who would be willing to pay for this?" The clear inference is that she was willing to prostitute herself. William M. Lips said he would inquire.

Before leaving at about 9:30, Cynthia Carite kissed William M. Lips and said, "How about something for the gold mine . . . to keep it open?" William M. Lips gave her $60 in cash. She responded that she thought she was worth $200, or his wife would find out. William M. Lips said he would meet her outside the Base Exchange at 10:00 the next morning with the rest of the money. Cynthia Carite threatened to ruin his career if he didn't and she warned him not to cross her. The next day at 10:00 he looked for her at the Base Exchange and later at Foodland, but he could not find her. He returned to work and was informed that Air Force Office of Special Investigation (OSI) agents were looking for him.

Cynthia Carite's story is considerably different. According to Cynthia Carite, soon after she arrived, William M. Lips, threatened her with a knife, pointed a gun at her, and forced her to perform "kinky sex." After dinner she and William M. Lips went upstairs and engaged in further sexual conduct. She was in fear of her life. The next day she discussed the evening with the man she was living with and later reported William M. Lips to the authorities. William M. Lips was arrested the same day, read his rights, and on the advice of defense counsel, made no statement to the authorities.

B. General Court-Martial

On *September 1, 1984*, Senior Master Sergeant William M. Lips was tried by general court-martial at Hahn Air Force Base, Germany, on charges of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. Sec. 920 (1988); forcible sodomy in violation of Article 125, UCMJ, 10 U.S.C. Sec. 925 (1988); and aggravated assault (three-counts) in viola-

tion of Article 128, UCMJ, 10 U.S.C. Sec. 928 (1988). He was convicted of the offenses and sentenced to a dishonorable discharge, 20 year's confinement, total forfeiture of pay and allowances, and reduction to the rank of airman basic.

At trial the defense counsel called Senior Master Sergeant William M. Lips as a witness to testify. At the beginning of his examination, the defense counsel asked Sergeant Lips the following two questions:

> Q. Senior Master Sergeant Lips, is this the first statement that you have made, the first statement publicly to government officials?
>
> A. Yes, Sir.
>
> Q. Why is that?
>
> A. The day I was apprehended, or late that evening, about eleven o'clock, I talked with Captain Hallett-Weller, the [Assigned Defense Counsel], on the telephone. She advised me not to make any statements to anyone under any circumstances about what had occurred in my apartment on the 4th of June. . . .[1]

In response to additional questions asked by defense counsel, William M. Lips testified that Cynthia Carite came to his home while his wife was away, had sexual relations with him, had dinner with him, had sexual intercourse with him after dinner, and then asked him for money in return for not telling his wife about what occurred.

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[1] (R. 838). These two questions asked by the defense counsel are improper and should have been objected to by the prosecutor. In the absence of an objection from the prosecutor, the military judge should have admonished counsel. Mil. R. Evid. 512(a)(1) of the Manual for Courts-Martial specifically prohibits either trial or defense counsel from referring to the defendant's post-arrest silence. Mil. R. Evid. 512(a)(1), MCM, 1984 at III-31. *See also Morgan v. Hall*, 569 F.2d 1161, 1168 (1st Cir.), *cert. denied*, 407 U.S. 910 (1978) (although defense counsel first raised the matter of defendant's post-arrest silence, the prosecution improperly used the silence to undermine the accused's testimony).

On cross-examination the prosecutor asked Sergeant Lips the following questions:

Q. Is there any part of it that I've mentioned to you that you have not had for weeks before you c[a]me in here for first time and t[old] your story about this?

A. This is not the first time I've told my story about this, sir.

Q. We've been through that, Sergeant Lips. I asked you a simple question. This is, in fact, the first time you've told your story to anyone who is not required to keep from disclosing it?

. . . .

Q. Before you came in this courtroom and told your story to anybody that had anything to do with the prosecution of this case, any official concerned with it for that matter who was not required to keep what you told them quiet, before that happened, you had every bit of material I've talked about here and you [had] it for weeks, did you not?

A. Yes, sir.

Q. And you have measured your account of this against that material and waited until this time to tell it, correct?

A. I have not measured my account against that material, no, sir.

Q. You have waited until this time—

A. I have examined all that material, yes, sir.

Q. —and you have waited until this time to provide this account, correct?

A. I didn't have any other opportunity to provide this account, sir.

Q. I didn't ask you that, Sergeant Lips. We went through that again. Do you want to do it again? You don't think the OSI would have talked to you? You don't think I would have talked to you? You don't think Captain Basten would

have talked to you? You don't think the security police would have talked to you?

A. Objection, Your Honor.

. . . .

Q. You know that what's going on here is that you have chosen not to talk about this for the reasons that you told us because it was the advice of counsel and because you thought it was in your best interests. But you also know that if you wanted to talk about it, you could have each and every day. You could have talked to me [the prosecutor]. You could have talked to Captain Basten [the assistant prosecutor]. You could have talked to the OSI [criminal investigators]. You could have talked to your commander. You could have talked to any number of people.

(R. 1235-38). The trial judge did not halt this line of questioning or give limiting instructions to the jury.

In closing argument the prosecutor stated that no evidence of guilt could be inferred from the fact that Sergeant Lips waited until the trial to tell his story, but then the prosecutor proceeded to comment extensively on Lips' post-arrest silence, how the victim had told her story to the police immediately, but how the accused had said nothing until the trial, and how Lips had time to fabricate a story after hearing the evidence.

He's getting the fruits of everything she says. He can mull over and sort through what she's had to say about this, and he can turn and twist the story in-between. More important than mulling over or sorting through what she's had to say about this, he can mull over and sort through the other evidence, things that have been found in his house, things that have been found out about him. And he can try to weave the lie between those things. He has the opportunity to do that for weeks and weeks, and weeks, undistracted. Then he comes in this courtroom and he sits down here and testifies. And in terms of trying to find out whether or not he's lying, there's not

> six other stories that he's told on six other occasions to measure it against. . . .

(R. 1700).

> But what happened is, this guy sat here and he told a story on Saturday. Nobody's ever heard it before. Nobody's ever had a chance to study, think, and figure out how to take him apart. And nobody knows what his answers to the on and on and on questions will be. So I stand up here and jerk him around, trying him out. And you all see the product. Now, again, contrast that with the situation that the girl was in. Her story's been told from the 5th of June, on.

(R. 1708). The defense counsel did not object to the prosecutor's improper references to Sergeant Lips' post-arrest silence; nor did the military judge instruct the jurors that such references to Sergeant Lips' post-arrest silence were improper and that no inference of guilt should be drawn from them.

At Sergeant Lips' trial, the prosecutor also introduced into evidence a 65-minute pornographic video tape and four sadomasochistic magazines which were shown to the jurors. Sergeant Lips objected to the introduction of the magazines and the video tape on the grounds that the items were admitted in violation of Military Rules of Evidence 403 and 404(b).[2] After reviewing the magazines and video tape, the military judge admitted the items in evidence and showed the 65-minute pornographic video tape in its entirety to the jury and showed the magazines to the jurors.

C. United States Air Force Court of Military Review

Senior Master Sergeant William M. Lips appealed his court-martial conviction to the United States Air Force Court of Military Review. In his brief, Senior Master Sergeant William M. Lips argued that the prosecutor's

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[2] *United States v. Biswell*, 700 F.2d 1310, 1316 (10th Cir. 1983) (probable value of prior acts substantially outweighed by danger of unfair prejudice under Rule 403).

improper comments on Lips' post-arrest silence during cross-examination and closing argument was unconstitutional under *Doyle v. Ohio*, 426 U.S. 610 (1976).[3]

The three military officers serving on the United States Air Force Court of Military Review rejected Lips constitutional challenge to the prosecutor's comments in three sentences. *United States v. Lips*, 22 M.J. 679, 883 (1986). *See* App. at 28a. In addressing the *Doyle* issue, the Air Force Court of Military Review never discussed Lips' contention that the prosecutor impermissibly commented on Lips' post-arrest silence during cross-examination.

In the Air Force Court of Military Review, Senior Master Sergeant Lips also challenged the admissibility of

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[3] In his brief to the Air Force Court of Military Review Senior Master Sergeant Lips argued as follows:

> Appellant's trial included approximately two weeks of evidence taking and witnesses. During trial counsel's *cross-examination* of appellant, appellant was questioned extensively as to when he first talked to anyone concerning the alleged incident and in particular, why he chose not to talk to anyone other than his counsel prior to trial, (in fact, trial counsel's phraseology consistently utilized the attorney-client privilege to indicate that the appellant's version of the incident was somehow improperly withheld until trial.) (R. 1235-42) The *apparent purposes of this line of questioning were twofold on the part of trial counsel. First*, he was seeking to establish a negative inference which he later vigorously argued to the members, from the fact that appellant had remained silent prior to trial. *Secondly*, trial counsel was on a fishing expedition for any matter protected by the attorney-client privilege that he could get the appellant to divulge on cross-examination.

Appellant's Brief submitted to the Air Force Court of Military Review (emphasis added). In addition, William M. Lips argued in his brief to the Air Force Court of Military Review that:

> "[*t*]*hrough* cross-examination, and again several times during his argument on findings, *trial counsel relied on a theory that commenting upon a failure of appellant to speak up prior to his trial is appropriate to impeach appellant*, a theory unsupported by law. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)."

Id. (emphasis added).

the pornographic 65-minute video tape and the sexually explicit magazines under Military Rules of Evidence 403 and 404(b).[4] The Court concluded that the evidence was properly admitted to establish Lips' "motive, intent, plan and design," and that the "trial judge was within the broad discretion given him to admit the challenged evidence."[5] The Air Force Court also concluded the "photographs and the video tape depicted scenarios for non-consensual sex."[6]

D. United States Court of Military Appeals

The United States Court of Military Appeals denied discretionary review on *March 2, 1987*. App. at 20a. On *April 17, 1987*, the United States Court of Military Appeals also denied William M. Lips' petition for reconsideration. App. at 19a. And on August 13, 1987, the Judge Advocate General of the Air Force denied William M. Lips' motion for a new trial.

E. United States District Court

On *October 27, 1988*, while confined in the United States Disciplinary Barracks at Leavenworth, Kansas, William M. Lips filed a petition for a writ of habeas corpus under 28 U.S.C. Sec. 2241 (1988) in the United States District Court for the District of Kansas naming the Commandant of the Disciplinary Barracks as the defendant. In his petition for habeas corpus, William M. Lips alleged (1) that the military judge improperly ad-

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[4] Military Rules of Evidence 403 and 404(b) are identical to Federal Rules of Evidence 403 and 404(b).

[5] *United States v. Lips*, 22 M.J. 679, 682-83 (AFCMR 1986). App. at 25a and 27a.

[6] *Id.* at 682. App. at 26a. The trial judge admitted the evidence at trial even though he recognized that the type of activity revealed in the video tape "would always purport to demonstrate *consensual conduct, not forcible conduct* on an unwilling victim." (R. 212). The Air Force Court of Military Review thus inaccurately and incorrectly states that the "photographs and the video tape depicted scenarios for *non-consensual sex*." *Id.*

mitted certain sexually explicit materials at trial; and (2) that the prosecutor violated his right against self-incrimination by referring to his post-arrest silence during *cross-examination* and in *closing argument*.

On *July 31, 1992* the United States District Court for the District of Kansas granted William M. Lips' petition for habeas corpus holding that the prosecutor's repeated comments on William M. Lips' post-arrest silence resulted in a violation of his constitutional rights under the Fifth Amendment of the Constitution. *Lips v. Commandant, United States Disciplinary Barracks*, —— F. Supp. —— (D.C.K. #88-3396, July 31, 1992). App. at 9a. The District Court denied William M. Lips' second contention that 65-minute pornographic video tape and 4 sexually explicit magazines were improperly admitted into evidence in violation of Military Rules of Evidence 404(b) and 403. The District Court concluded that the "trial judge admitted the evidence to show motive, intent, plan, and design" and that Sergeant Lips "failed to show that the trial judge's ruling resulted in a fundamentally unfair trial." App. at 11a.

In considering William M. Lips' petition for habeas corpus, the District Court acknowledged that "its review of a claim made in a military habeas corpus petition is limited." *Id.* The District Court also applied the four-part test set forth by the Tenth Circuit Court of Appeals in *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990), for reviewing petitions for habeas corpus from military servicemen. *See* App. at 5a and *infra* at 15. In applying the four-part test, the District Court concluded (1) "that the asserted error, impermissible comment on petitioner's post-arrest silence, is of substantial constitutional dimension"; (2) that "the issue before the court is clearly one of law rather than a fact question previously determined by the military tribunal"; (3) that there are "no unique military considerations which apply to this issue"; and (4) that "the issue was raised before the military courts of review," but was summarily dismissed on

the grounds of "waiver for lack of contemporaneous objection." App. at 12a.

Having decided that William M. Lips' "claim meets the requirements for review," the District Court considered the issue of whether prosecutor's repeated comments on Lips' post-arrest silence violated his Fifth Amendment rights under the Constitution. *Id.* The District Court reviewed the transcript and found it "reveals numerous occasions during cross-examination where the prosecutor repeatedly referred to petitioner's failure to 'tell anyone his story until now.' "[7] In addition, the District Court notes the existence of "other exchanges throughout the transcript where direct comment was made [by the prosecutor] concerning petitioner's post-arrest silence." *Id.*

Based on the record, the District Court "concludes that the manifest intent of the prosecutor was to comment on the petitioner's post-arrest silence and, thus, attack his credibility" and that "the natural and necessary impact is that the jury would draw the conclusion that the comments and questions concerned petitioner's right to remain silent." *Id.*

The District Court notes that defense counsel objected at least once in response to the prosecutor's questions. The District Court found, however, that "even if the [Air Force Court of Military Review] did not find [the objection sufficient to preserve the issue], under plain error analysis, the continuous and repeated comment on petitioner's post-arrest silence was 'obvious and substantial error that affected the fairness, integrity or public reputation of the judicial proceedings.' " App. at 17a.

The District Court concludes that the "prosecutor's repeated comments on petitioner's post-arrest silence resulted in a violation of [petitioner's] constitutional rights guaranteed under the Fifth Amendment." App. at 17a-18a. For this reason, the District Court ruled that "peti-

[7] App. at 10a. *See* App. at 13a-14a for examples of the prosecutor's comments on cross-examination.

tioner did not receive a fair trial" and granted petitioner's writ of habeas corpus. *Id.*

F. Court of Appeals for the Tenth Circuit

The United States appealed the District Court's decision to the Tenth Circuit Court of Appeals. On *July 1, 1993*, the Tenth Circuit Court of Appeals reversed holding that the District Court (1) erred in considering petitioner's contention that he was denied a fair trial because sexually explicit evidence was improperly admitted at his court-martial, and (2) erred in granting habeas corpus relief on the grounds that the petitioner's constitutional rights were violated by the prosecutor's improper cross-examination and closing argument.

In its decision the Tenth Circuit Court of Appeals concluded "that although the federal district court had jurisdiction to entertain Lips' petition, its scope of review was . . . limited to determining whether" the military courts gave full and fair consideration to the issues Lips raised in his federal habeas corpus petition. App. at 4a. If the issues "were given full and fair consideration by the military courts," the Court of Appeals notes, "the district court should have denied the petition." *Id.*

After reviewing the record of trial, the Court of Appeals concluded that the military courts did give "full and fair consideration" to the constitutional issues Lips raised in his federal habeas corpus petition. App. at 4a, 6a. Because the constitutional issues raised by Lips were fully and fairly considered by the Air Force Court of Military Review, the Court of Appeals reversed the District Court's decision granting the writ of habeas corpus and remanded the case "to the district court with directions to deny the petition." App. at 4a.

In reversing the District Court's decision, the Tenth Circuit Court of Appeals notes that the scope of review applied by federal courts in reviewing habeas corpus petitions from military personnel is narrower than that applied in reviewing civil cases. App. at 5a. Thus, accord-

ing to the Tenth Circuit Court of Appeals, the "function of the civil courts" in reviewing military habeas corpus petitions is limited to determining whether the claims raised by a military service member have been given full and fair consideration by the military courts. App. at 6a.

Consistent with this view, the Tenth Circuit Court of Appeals outlined in *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990), a four-part test for federal courts to use in determining if a constitutional issue in a military habeas corpus petition has been fully and fairly considered by a military court.

> [R]eview by a federal district court of a military conviction is appropriate only if the following four conditions are met: (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.

App. at 5a-6a. The District Court applied this four-part test and held "the military failed to give adequate consideration to Lips' contention" that his Fifth Amendment rights were violated by the comments made by the prosecutor on Lips' post-arrest silence in cross-examination and during closing argument. App. at 6a. The District Court, however, did not apply the four-part test in denying "Lips' claim regarding the [improper] admission of the sexually explicit materials." *Id.*

The Tenth Circuit Court of Appeals, applying the same standard, reaches a different result and concludes "that the military courts [gave] the matters raised in [Lips'] federal habeas corpus proceeding full and fair consideration and that the district court erred in reviewing these matters *de novo*." App. at (7)a.

The Tenth Circuit states that Lips, in his brief to Air Force Court of Military Review, sets forth as a separate issue the prosecutor's improper comments made during closing argument on Lips' post-arrest silence. However, the Tenth Circuit notes that Lips "did not set forth as a separate issue [in his brief] the prosecutor's cross-examination of Lips and [the Court further notes that Lips] made only passing reference to improper cross-examination in his argument under 'Issue V.' " [8]

With respect to the prosecutor's comments on closing argument, the Tenth Circuit Court of Appeals concludes that "the United States Air Force Court of Military Review gave the issue of improper closing argument 'full and fair consideration,' as required by *Burns v. Wilson* . . ., and also gave 'adequate consideration' to the issue and applied 'proper legal standards,' as required by our *Dodson v. Zelez* . . ." App. at 7a. *See* App. at 28a. For this reason, the Tenth Circuit concludes that "the district court erred in granting habeas corpus relief based on improper prosecutorial closing argument." *Id.*

With respect to the issue of the prosecutor's improper comments on Lips' post-arrest silence during cross-examination, the Tenth Circuit observes that "defense counsel made only one nonspecific objection to this line of questioning" and "did not raise the issue of improper cross-examination on appeal to the United States Air Force Court of Military Review." *Id.* "Because defense counsel did not make a timely and specific objection and also did not assert the issue of improper cross-examination on appeal," the Tenth Circuit concludes that "the matter . . . was not raised in the military courts." *Id.*

Finding nothing in the record indicating an " 'excuse' for either of these procedural defaults," the Tenth Circuit, applying the "cause and prejudice" standard used in reviewing state and federal habeas cases, concludes that the " 'cause and actual prejudice' standard was not met," and held that "the claim of improper cross-examination will

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[8] *See supra* note 3 and accompanying text.

not be reviewed 'on the merits' in the present habeas corpus proceeding." App. at 8a.

In the alternative, the Tenth Circuit Court of Appeals states that the Air Force Court of Military Appeals fully and fairly considered the issue of prosecutor's references to Lips' post-arrest silence in cross-examination, even though the court issued no opinion on the issue, and that the District Court committed error in ruling on the issue.

> Even assuming that counsel's objection at trial to the prosecutor's cross-examination was adequate and further assuming that the matter of improper cross-examination was presented to the United States Air Force Court of Military Review, the fact that the court did not specifically address the question of improper cross-examination in its opinion is not controlling.

App. at 8a n.2. The Tenth Circuit Court of Appeals notes that the absence of a discussion in the Air Force Court of Military Review's opinion concerning the prosecutor's references in cross-examination to Lips' post-arrest silence is not critical because the Air Force Court of Military Review states at the end of its opinion that it has " 'examined the remaining assignments of error and resolved them against the appellant.' " *Id.*

The practice of allowing military courts to decide constiutional issues summarily, the Tenth Circuit Court of Appeals notes, was approved by it in *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986).

> When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion. 782 F.2d at 145.

App. at 8a n.2. In short, the Tenth Circuit Court of Appeals concludes that because the Fifth Amendment

issue concerning the prosecutor's comments on Lips' post-arrest silence during cross-examination was briefed and argued before the Air Force Court of Military Review, it was fully and fairly considered by the military court even though the issue was summarily disposed of with the statement: "We have examined the remaining assigned errors and resolve them against the appellant." App. at 30a.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court of the United States should GRANT [9] the petition for a writ of certiorari in the present case for three reasons: *First*, the decision of the United States Court of Appeals for the Tenth Circuit is in conflict with decisions of the First, Third, Fourth, Fifth, Eighth, Ninth, District of Columbia, and Federal Circuit Courts of Appeal on the issue of the scope of federal court review of military habeas corpus petitions; *Second*, the decision of the Court of Appeals for the Tenth Circuit dramatically restricts the scope of federal court review of constitutional issues raised in military habeas corpus petitions; and *Third*, the decisions of the Court of Appeals for the Tenth Circuit and the Air Force Court of Military Review upholding prosecutorial comment on a defendant's post-arrest silence and the government's use of specific intent evidence, *i.e.*, plan, intent, motive, and design, introduced under Rule 404b and 403, to prove general intent crimes are contrary to decisions of the Supreme Court and Court of Appeals for the Fourth Circuit.

I. CONFLICT IN THE CIRCUITS ON THE SCOPE OF FEDERAL COURT REVIEW OF MILITARY HABEAS CORPUS PETITIONS

The first reason the Supreme Court should grant the petition for a writ of certiorari in the present case is be-

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[9] In the alternative, the Supreme Court may want to HOLD this petition for the Court's decision in *Weiss v. United States*, 36 M.J. 224 (CMA 1992), *cert. granted*, —— U.S. —— (No. 92-1492, May 24, 1993) invoking the Appointments Clause and terms-of-office for military judges and Court of Military Review judges.

cause the decision of the Court of Appeals for the Tenth Circuit is in conflict with decisions of the Courts of Appeals for the First, Third, Fourth, Fifth, Eighth, Ninth, District of Columbia, and Federal Circuits on the issue of the scope of federal review of military habeas corpus petitions.

After World War II and at the end of Korean War the Supreme Court of the United States decided *Burns v. Wilson*, 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953). In *Burns*, the Supreme Court broadened the power of the federal courts to review military cases because of the great number of American citizens who were serving or had served in the armed forces.[10]

In affirming the judgment of the Circuit Court of Appeals for the District of Columbia to deny petitions for habeas corpus submitted to the Court from service mem-

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[10] I suppose it cannot be said that the courts of today are more knowledgeable about the requirements of military discipline than the courts in the early days of the Republic. Nevertheless, events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.

> These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 107-88 (1982). *See* J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 122-33 (New York: Charterhouse, Inc., 1974).

bers, Chief Justice Vinson in a plurality opinion,[11] states that "it is the limited function of the civil courts to determine whether the military have given fair consideration to each of [the accused's] claims" and "when a military decision has dealt fully and fairly with an allegation raised in [the accused's] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." [12]

The standard that has evolved is that Article III courts can review court-martial judgments on two grounds: the first ground is that a court-martial judgment is void because the court lacked jurisdiction, and the second ground is that the court-martial is defective or procedurally unfair in some fundamental way.[13]

Since *Burns*, the Circuit Courts of Appeal have disagreed over what the proper scope of federal court review of military habeas corpus petitions should be.[14] Some courts have viewed the decision in *Burns v. Wilson*,[15] as expanding "the scope of review slightly, or, at least, to

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[11] Chief Justice Vinson's opinion was joined by Justice Reed, Justice Burton, and Justice Clark. Justice Jackson concurred in the result. Justice Minton concurred in affirming the judgment. Justice Frankfurter thought the case should be reargued. And Justice Douglas' dissenting opinion was joined by Justice Black.

[12] 346 U.S. at 144 and 142.

[13] *Schlesinger v. Councilman*, 420 U.S. 738, 747 (1975).

[14] *Calley v. Callaway*, 519 F.2d 184, 198-99 n.20 (5th Cir. 1975), *cert. denied sub nom., Calley v. Hoffman*, 425 U.S. 911 (1976). *See* Rich, *Federal Court Scope of Review Over Military Habeas Corpus Cases*, 6 MEMPHIS ST. U.L. REV. 83 (1975). *See also* Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 81 COLUM. L. REV. 40, 70 (1981); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1, 28-54, 74-81 (1971); Burris & Jones, *Civilian Courts and Courts-Martial—the Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139 (1971); J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 135-36 (New York: Charterhouse, Inc., 1974); Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193 (1966).

[15] 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953).

have shifted the emphasis from mere 'jurisdiction' and 'power,' as the proper subjects for civilian court review, to broader considerations of the 'fullness' and 'fundamental fairness' of the court-martial proceedings." [16] Other courts have developed their own interpretations of the "full and fairness" standard.[17] The standard adopted by

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[16] *De Coster v. Madigan*, 223 F.2d 906, 909 (7th Cir. 1955), *companion case rev'd., Jackson v. Taylor*, 353 U.S. 569, 571 (1957). *See Jackson v. Taylor*, 353 U.S. 569, 572 n.2 (1957).

[17] *See First Circuit*: *Allen v. VanCantfort*, 436 F.2d 625, 629 n.8 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971) (ineffective assistance of counsel reviewed even though the issue was fully considered by the military appellate courts);

Third Circuit: *White v. Humphrey*, 212 F.2d 503 (3rd Cir.), *cert. denied*, 348 U.S. 900 (1954) (full and fair consideration standard ignored and denial of constitutional due process issue reviewed);

Fourth Circuit: *Kasey v. Goodwyn*, 291 F.2d 174, 178 (4th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962) (denial of constitutional due process issue summarily considered and denied);

Fifth Circuit: *Calley v. Callaway*, 519 F.2d 184, 228 (5th Cir. 1975), *cert. denied sub nom., Calley v. Hoffman*, 425 U.S. 911 (1976) (extensive review of constitutional issues even though most of the constitutional issues were fully and fairly considered by the military appellate courts);

Ninth Circuit: *Daigle v. Warner*, 348 F. Supp. 1074, 1078 (D.C. Hawaii 1972), *rev'd on other grounds*, 490 F.2d 358 (9th Cir. 1973) (full and fair consideration standard "has been subject to different interpretations, [but] the underlying rationale is that review on [military habeas corpus petitions] should be afforded when the petitioner has allegedly been denied a basic constitutional right, the absence of which materially affected his rights to a fair hearing); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) (*Burns* plurality does not preclude civil court consideration of the constitutional defects alleged here where it is not clear the issue was fully and fairly considered because no military court articulated an analysis of them);

District of Columbia Circuit: *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (DCC 1969), *cert. denied*, 396 U.S. 1013 (1970) (rejecting government's contention that civilian court review of alleged constitutional errors in court-martial proceeding is precluded where military courts have fully and fairly considered the constitutional issues); *Avrech v. Secretary of the Navy*, 520 F.2d 100 (DCC 1975), *cert. denied*, 425 U.S. 970 (1976) (constitutional issues

the Tenth Circuit Court of Appeals in the present case—that once an issue is briefed and argued before a military court, it is considered to be fully and fairly considered by the military courts and cannot be reviewed by a District Court if the issue is raised in a military habeas corpus petition—is one of the narrowest interpretations of the "full and fair" consideration standard.[18]

In short, different standards of review are being used in the various Circuit Courts of Appeals to review constitutional issues raised in military habeas corpus petitions. Service members, in other words, who raise a constitutional issue in a petition for habeas corpus filed with a District Court, are not having their petitions reviewed uniformly by courts throughout the country. For these reasons, Counsel for Petitioner respectfully requests the Court GRANT the petition for a writ of certiorari in the present case to ensure that all service members who file petitions for writs of habeas corpus in the federal courts receive uniform consideration of the constitutional issues raised in their petitions.

II. ELIMINATION OF FEDERAL COURT REVIEW OF MILITARY COURT DECISIONS IN THE TENTH CIRCUIT

The second reason the Supreme Court should GRANT the petition for a writ of certiorari in the present case is because the decision of the Court of Appeals for the

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raised by service members in military courts are reviewable by federal courts);

Federal Circuit: *Shaw v. United States*, 357 F.2d 949, 953 (Ct. Cl. 1966) (court of claims will review constitutional issues raised by service members even though the issues have been reviewed by military courts).

[18] *Lips v. Commandant, United States Disciplinary Barracks*, —— F.2d —— (10th Cir. #92-3359, July 1, 1993) (Article III judge's finding that prosecutor's continuous and repeated comments on service member's post-arrest silence was an "obvious and substantial error that affected the fairness, integrity, or public reputation of judicial proceedings" reversed where military court fully and fairly considered the issue and denied it summarily without opinion).

Tenth Circuit so restricts federal court review of constitutional issues raised in military habeas corpus petitions that the right of a service member to file a petition for habeas corpus in the Tenth Circuit is rendered meaningless.

The Tenth Circuit Court of Appeals' interprets the standard announced by the Supreme Court in *Burns* to mean that once a constitutional issue is briefed and argued in a military court, there is an unrebuttable presumption that the issue has been fully and fairly considered by the military court irrespective of whether the military court writes an opinion on the issue or disposes of it summarily.

In *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Tenth Circuit Court of Appeals outlined a four-part test for determining when federal court review of a military conviction on habeas corpus is appropriate.[19] Part four of the test states that a military court must give the issue adequate consideration and apply proper legal standards in reviewing it before the issue can be reviewed by a District Court in a military habeas corpus petition. In other words, a District Court in the Tenth Circuit cannot consider a constitutional issue raised in a military habeas corpus petition unless (1) the issue has been briefed and argued before a military court, (2) the military court has given the issue adequate consideration, and (3) the military court has applied proper legal standards in reviewing it.

The analytical problem presented is that if the constitutional issue is briefed and argued before a military court, and is addressed by the military court in either an opinion or is disposed of summarily, the Tenth Circuit considers that the issue has been fully and fairly considered by the military courts and therefore cannot be reviewed by a District Court if the issue is raised in a military habeas corpus petition.

In effect, the Tenth Circuit Court of Appeals has eliminated federal court review of military court decisions in

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[19] *See supra* at 15.

the Tenth Circuit and has denied the writ of habeas corpus to service members who believe their constitutional rights have been violated by the military justice system. If a service member is required to brief and argue a constitutional issue in a military court before the issue can be reviewed by a District Court in a petition for habeas corpus, and if every issue briefed and argued before a military court is deemed by the Tenth Circuit Court of Appeals to be fully and fairly considered by the military court, even if it is dismissed summarily, then no federal district court will ever be able to review a petition from a military court in the Tenth Circuit because every issue will be fully and fairly considered by the military courts and hence not subject to federal court review.

The Tenth Circuit Court of Appeals' application of the *Burns* full and fair consideration standard is so restrictive that it virtually eliminates federal court review of military court decisions in the Tenth Circuit and renders the right of service members to habeas corpus relief in the Tenth Circuit nonexistent.

The importance of denying effective habeas corpus relief to active duty and reserve military personnel is important when one considers that over two million men and women are serving in the armed forces of the United States—all of whom are subject to the Uniform Code of Military Justice and military criminal justice system. This group is larger than the number of citizens subject to criminal codes in the States of Alaska, Wyoming, Vermont, Delaware, North Dakota, South Dakota, Montana, Nevada, New Hampshire, Idaho, Rhode Island, Hawaii, Maine, New Mexico, Utah, Nebraska, and West Virginia.[20]

The policy of denying access of young men and women serving in the armed forces of the United States to

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[20] In World War II, there were over 12,300,000 young men and women who served in the armed forces and were subject to the military justice system. Karlan & Pepper, *The Scope of Military Justice*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 285, 286 (1962).

federal courts and of discouraging them from raising legitimate constitutional issues in petitions for habeas corpus is not a policy that his Court should encourage. Not only are these young citizens defending the Constitution and willing to give up their lives for it if necessary, but also they on occasion may need assistance from the federal judiciary and the benefit of civilian review of a constitutional issue.

In the present case petitioner William M. Lips, a career serviceman, was convicted in 1984 by general court-martial and received a 20-year sentence. To date the constitutional violations he raised on appeal have been fully and fairly considered *only* by military officers. A federal district court judge in the Tenth Circuit did rule that Lips' Fifth Amendment rights were violated in his trial, that the constitutional violation amounted to plain error, and that Lips should be retried. But the Tenth Circuit Court of Appeals reversed that decision holding that military officers had fully and fairly considered the constitutional violations raised by Lips in his military habeas corpus petition and that the federal district court judge erred in considering his petition.

To avoid the kind of injustice William M. Lips has had to suffer—no civilian review of his constitutional claims—and to ensure that all military personnel with legitimate constitutional claims will have access to the federal courts if the need arises, the Court should grant the petition for a writ of certiorari in this case and establish rule for federal courts to follow in reviewing habeas corpus petitions filed by service members.

III. THE MILITARY COURT APPLIED THE WRONG LEGAL STANDARDS IN REVIEWING CONSTITUTIONAL ISSUES PRESENTED BY LIPS IN THE APPEAL OF HIS COURT-MARTIAL CONVICTION

The third reason the Supreme Court should grant the petition for a writ of certiorari in the present case is because the Air Force Court of Military Review applied the wrong legal standards in deciding both the post-arrest

silence issue and the evidentiary due process issue raised by Lips in the appeal of his court-martial conviction. On the post-arrest silence issue and the 404b and 403 evidentiary issues, the Tenth Circuit Court of Appeals concludes that Lips' constitutional cliams were fully and fairly considered by military authorities and properly denied.

A. Post-Arrest Silence Issue

The Air Force Court of Military Review devotes three sentences in its opinion to the *Doyle* issue raised by William M. Lips in the appeal of his court-martial conviction:

> [Lips] also contends he is entitled to a new trial because of improper findings and sentencing arguments by government counsel. [Lips'] counsel entered no objection at trial to the new challenged statements made during argument. In view of this, we consider this issue to be waived on appeal in the absence of plain error, which we find no basis here to invoke.

See supra 10 and at 21a. The military court concludes that the *Doyle* issue was waived because no objection was made during argument.

In *United States v. Arnold,* 425 F.2d 204 (10th Cir. 1970), however, the defense counsel did not present a *Doyle* issue objection on closing argument until the case was before the Tenth Circuit Court of Appeals. In addressing the issue and reversing the defendant's conviction, the Tenth Circuit states:

> We are in complete agreement that the record reflects more than ample evidence to support conviction and that the trial court correctly determined that no claim of error presented to support the motion for a new trial had merit. However, appellate counsel presents an additional assignment of error, made for the first time in this court, that is so clearly meritorious in view of our decision in *United States v. Nolan*, 10 Cir., 418 F.2d 588, that we are compelled to reverse the judgment regardless of the lateness of presentation. . . . The error climaxes, as in *Nolan,*

> with a prejudicial closing argument by the government attorney.

Id. at 205. Despite its decision in *Arnold,* the Tenth Circuit Court of Appeals concludes the military court applied the correct legal standard in holding that Lips waived his objection to the prosecutor's prejudicial closing argument. "We think," the Tenth Circuit states, "the United States Air Force Court of Military Review gave the issue of improper argument 'full and fair consideration, as required by *Burns v. Wilson,* . . . and also gave 'adequate consideration' to the issue and applied 'proper legal standards.' " App. at 7a.

In its *Lips* opinion, the Tenth Circuit also states that:

> In cross-examination, the prosecutor attempted to show that the real reason Lips made no post-arrest statements was that he desired to hear Cynthia Carite's testimony in court before giving anyone his version of events so that he could "tailor" his testimony and make it believable. Further, in closing argument to the military jury, the prosecutor stated that while Lips' post-arrest silence was no evidence of guilt, Lips had nonetheless waited until trial "to tell his story," so that he could first hear Cynthia Carite's testimony.

App. at 4a. In these two sentences, the Tenth Circuit Court of Appeals correctly summarizes the intent of the prosecutor in commenting on Lips' post-arrest silence.

In *Doyle v. United States,* 426 U.S. 610 (1976) the Supreme Court of the United States held that this line of questioning and argument used by the prosecutor is improper.

> The State pleads necessity as justification for the prosecutor's action in these cases. It argues that the discrepancy between an exculpatory story at trial and silence at the time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings. . . .

> Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position.

Id. at 616-17. Despite the clearness of the holding in *Doyle*, the Court of Appeals for the Tenth Circuit finds no violation of Lips' Fifth Amendment rights to a fair trial.

By concluding that the military court applied the correct legal standard in deciding the post-arrest silence issues presented by Lips, and by approving the military court's decision on the issues, the Tenth Circuit erred.

B. Specific Intent Evidence Used to Prove General Intent Offenses

With respect to the evidentiary issue and the introduction of sexually explicit materials at Lips' court-martial, the Air Force Court of Military Review states that the pornographic video tape and four sexually explicit magazines were introduced "to establish motive, intent, plan and design" on the part of Lips. App. at 25a. On this due process issue the District Court and the Tenth Circuit Court of Appeals agree that the military court applied the correct legal standard. All three courts agree, in other words, that specific intent evidence, that is, evidence of motive, intent, plan, and design admitted under Rule 404b, can be introduced by the government to prove a general intent offense.[21]

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[21] *See* App. at 25a. Intent, motive, etc. are not issues in Lips' case because the offenses with which Lips is charged—rape, sodomy, assault and battery—are general intent offenses, not specific intent offenses. It is not clear why the government had to introduce the sexually explicit evidence to establish intent, motive, etc. when Lips is charged with general intent offenses. *See United States v. Soundingsides*, 820 F.2d 1232 (10th Cir.), *pet. for rehearing denied*, 825 F.2d 1468 (1987) (per curiam) (evidence of other crimes, wrongs or acts is inadmissible in a general intent case); *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1949), (evidence admitted to prove intent, motive, etc. held inadmissible in general intent rape case where the only issue is whether the sexual contact was consensual or nonconsensual).

However, this finding is contrary to the decision of the Fourth Circuit Court of Appeals in *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1948). In *Lovely*, the Fourth Circuit held that the introduction of specific intent evidence was error in a general intent case where the outcome of the case turns on the credibility of the witnesses as it does in *Lips'* case. In *Lovely*, the defendant was charged with rape and the trial court permitted the introduction of evidence of a prior rape under similar circumstances to prove motive, intent, plan, etc., on the part of the defendant.

In holding that the trial court erred in admitting testimony about the "other rape," the Fourth Circuit Court of Appeals stated that "[t]here was no issue of identity in the case, nor of knowledge, motive or intent, and the crime was not the sort, like a stock swindling scheme or murder for insurance, where the commission of other crimes may tend to establish a plan from which the crime charged can be said to have resulted." *Id.* at 388. Indeed, the Court notes that the defendant admitted he was with the victim in his car and that he had sexual relations with her; thus, "the only question [in the case as in Lips' case is] whether he had had carnal knowledge of her forcibly and against her will." *Id.*

> The fact, if it was a fact, that he had ravished another woman some weeks before, threw no light whatever on that question. It showed merely that he was a bad man, likely to commit that *sort* of crime; and this is precisely what the prosecution is not allowed to show in a criminal case.[22]

Like the trial court in *Lovely*, the military judge in Lips' trial permitted the prosecutor to introduce specific intent evidence to prove the same kind of general intent offense tried in *Lovely*.

However, unlike the Fourth Circuit Court of Appeals, the Air Force Court of Military Review approved the prosecutor's introduction of specific intent evidence to

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[22] *Id. See United States v. Hickson*, 22 M.J. 146, 150 (CMA 1986) (rape is a general intent offense).

prove the general intent offenses Lips was charged with committing. The Tenth Circuit's holding that the military court applied the correct legal standard in reviewing Lips' evidentiary due process issue thus is contrary to the holding of the Fourth Circuit in *Lovely*.

In sum, the Air Force Court of Military Review applied the wrong legal standards in reviewing the post-arrest silence issue and in reviewing the introduction of specific intent evidence under Rule 404b, and the Tenth Circuit is wrong in its conclusion that the Air Force Court "fully and fairly" considered Lips' constitutional claims. Because the Tenth Circuit Court of Appeals held that Lips is not entitled to civilian review on these issues, Lips has never received a full and fair review of the constitutional issues he raised on appeal from the court-martial conviction he received in 1984.

CONCLUSION

Counsel for Petitioner respectfully requests that the Supreme Court of the United States grant the petition for a writ of certiorari in the present case (1) because the decision of the Court of Appeals for the Tenth Circuit is in conflict with decisions of numerous other Circuit Courts of Appeals on the issue of the scope of federal court review of military habeas corpus petitions; (2) because the decision of the Tenth Circuit Court of Appeals virtually eliminates federal court review of military habeas corpus petitions in the Tenth Circuit; and (3) because the military court applied the wrong legal standards in reviewing Lips' constitutional claims and in doing so denied him a fair trial.

Respectully submitted,

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Date: September 28, 1993 *Counsel for Petitioner*

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-3359 and No. 92-3360

WILLIAM M. LIPS,
Appellee/Cross-Appellant,

v.

COMMANDANT, UNITED STATES
DISCIPLINARY BARRACKS,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 88-3396-R)

[Filed July 1, 1993]

Jan Horbaly, Burke, Virginia, for Appellee Cross-Appellant.

Thomas E. Booth and David Shelledy, United States Department of Justice, Appellate Section, Criminal Division, Washington, D.C. (Jackie A. Rapstine, Assistant U.S. Attorney; Lee Thompson, U.S. Attorney, Topeka, Kansas; and Conrad Von Wald, LTC., Office of the Judge Advocate General, U.S. Air Force, Washington, D.C., with him on the brief), for Appellant/Cross-Appellee.

Before TACHA and BALDOCK, Circuit Judges, and McWILLIAMS, Senior Circuit Judge.

McWILLIAMS, Senior Circuit Judge.

This case concerns the relationship between the federal civil courts and the military courts.

William M. Lips, a Senior Master Sergeant serving on active duty in the United States Air Force and assigned to the 50th Civil Engineering Squadron at Hahn Air Force Base in Germany, was convicted in 1984 by a military jury of rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925; and aggravated assault (three counts), in violation of Article 128, UCMJ, 10 U.S.C. § 928. Lips was sentenced, *inter alia*, to twenty years' imprisonment.

On direct appeal, the United States Air Force Court of Military Review affirmed Lips' conviction and sentence. *United States v. Lips*, 22 M.J. 679 (AFCMR 1986). The United States Court of Military Appeals denied discretionary review, *United States v. Lips*, 24 M.J. 45 (CMA 1987), and also denied Lips' petition for reconsideration, 24 M.J. 203 (CMA 1987). Thereafter the Judge Advocate General of the Air Force denied Lips' motion for a new trial.

In 1988, while confined in the United States Disciplinary Barracks at Leavenworth, Kansas, Lips filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the District of Kansas, naming as the defendant the Commandant of the Disciplinary Barracks. In his petition, Lips set forth two grounds for relief: (1) that the military judge improperly admitted into evidence certain sexually explicit materials taken from his apartment by the arresting officers; and (2) that the prosecutor violated his right against self-

incrimination by referring to his post-arrest silence in cross-examination and in closing argument.

The district court rejected the first ground Lips advanced for habeas relief, but found Lips' second ground for relief based on improper reference to post-arrest silence to be meritorious and ordered the government to provide Lips with a new trial within 120 days or release him. The Commandant appeals the district court's grant of habeas relief (our No. 92-3359). Lips cross appeals that part of the district court's order denying relief on his first ground, i.e., the admission of the sexually explicit materials (our No. 92-3360). On motion, another panel of this court entered an order staying the judgment of the district court pending disposition of this appeal.

Limited background information regarding the court-martial is in order. The testimony of Cynthia Carite at trial established, *prima facie*, that Lips had committed the various crimes with which he was charged. Cynthia Carite testified, *inter alia*, that on the night in question Lips had shown her certain sexually explicit materials, including magazines and video tapes. After Lips' arrest, the officers searched his apartment and took certain magazines and tapes, some of which were later received into evidence at trial, over objection. The admission of these materials constituted Lips' first ground for habeas relief.

Although Lips had made no post-arrest statements to authorities, he did testify at trial and admitted that he had done the various acts to which Cynthia Carite had testified, but further testified that she had consented thereto. Lips' post-arrest silence was first raised by defense counsel in his direct examination of Lips. At the outset of direct examination, defense counsel asked Lips why he had made no post-arrest statements to the authorities. Lips answered that he had remained silent on the advice of counsel.

In cross-examination, the prosecutor attempted to show that the real reason Lips made no post-arrest statements was that he desired to hear Cynthia Cartie's testimony in court before giving anyone his version of events so that he could "tailor" his testimony and make it believable. Further, in closing argument to the military judge, the prosecutor stated that while Lips' post-arrest silence was no evidence of guilt, Lips had nonetheless waited until trial "to tell his story," so that he could first hear Cynthia Carite's testimony. Defense counsel made no objection at trial to the prosecutor's argument, which is not altogether surprising since the prosecutor conceded, in front of the military jury, that Lips' post-arrest silence was no evidence of guilt. The prosecutor's cross-examination of Lips and his closing argument to the jury constitute Lips' second basis for habeas relief.

Our study of the matter leads us to conclude that although the federal district court had jurisdiction to entertain Lips' petition, its scope of review was initially limited to determining whether the claims Lips raised in his federal habeas corpus petition were given full and fair consideration by the military courts. If they were given full and fair consideration, the district court should have denied the petition. The record indicates to us that the military courts did give full and fair consideration to the matters Lips sought to have the federal district court review. Therefore, the judgment of the district court granting habeas corpus relief is reversed and the case remanded to the district court with directions to deny the petition.

The military has its own independent criminal justice system governed by the Uniform Code of Military Justice. 10 U.S.C. §§ 801-940. The Code is all-inclusive and provides, *inter alia*, for courts-martial, appellate review, and limited certiorari review by the United States Supreme Court. Lips' petition for habeas corpus collaterally attacked a general court-martial conviction that was af-

firmed on appeal by the Air Force Court of Military Review. Because of the independence of the military court system, special considerations are involved when federal civil courts collaterally review court-martial convictions.[1]

The starting point in our discussion is *Burns v. Wilson,* 346 U.S. 137 (1953). That case stands for the proposition that federal courts have jurisdiction over applicants for habeas corpus by persons incarcerated by the military courts, though "in military habeas corpus the inquiry, the scope of matters open to review, has always been more narrow than in civil cases." *Id.* at 139. The plurality in *Burns* further stated that "when a military decision has dealt fully and fairly with an allegation raised in [a petition for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142. In like vein, the Court stated that "[i]t is the limited funtcion of the civil courts to determine whether the military have given fair consideration to each of these claims." *Id.* at 144.

Under *Burns,* if the military gave full and fair consideration to claims asserted in a federal habeas corpus petition, the petition should be denied. Only when the military has not given a petitioner's claims full and fair considerations does the scope of review by the federal civil court expand.

In *Dodson v. Zelez,* 917 F.2d 1250 (10th Cir. 1990), we held that review by a federal district court of a military conviction is appropriate only if the following four conditions are met: (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate con-

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[1] For an annotation on this general subject, see 95 A.L.R. Fed. 472.

sideration to the issues involved or failed to apply proper legal standards.

The district court held, in effect, that the military had failed to give adequate consideration to Lips' contention that the prosecutor in cross-examining Lips concerning post-arrest silence and in his closing argument violated Lips' Fifth Amendment right to remain silent. On that basis, the district court proceeded to review that matter *de novo*. The district court also reviewed Lips' claim regarding the admission of the sexually explicit materials without first determining whether the military had given that matter full and fair consideration. We disagree and believe that the military courts did give the matters raised in this federal habeas proceeding full and fair consideration and that the district court erred in reviewing these matters *de novo*.

The brief on behalf of appellant in the appeal to the United States Air Force Court of Military Review listed twelve numbered issues. In "Issue V," counsel asserted that three separate errors occurred during the prosecutor's closing argument. One of these errors was the prosecutor's comment on Lips' "exercise of his right to remain silent prior to trial." Counsel did not set forth as a separate issue the prosecutor's cross-examination of Lips and made only passing reference to improper cross-examination in his argument under "Issue V." In any event, the United States Air Force Court of Military Review in its opinion did not specifically refer to the improper cross-examination issue, though it did specifically comment regarding the improper closing argument issue. In this regard, that court spoke as follows:

> The appellant also contends he is entitled to a new trial because of improper findings and sentencing arguments by government counsel. Appellants' counsel entered no objection at trial to the now challenged statements made during argument. In view of this, we consider this issue to be waived on

> appeal in the absence of plain error which doctrine we find no basis here to invoke. R.C.M. 1001(g); *United States v. Fisher*, 21 M.J. 327 (1986); *United States v. Fisher*, 17 M.J. 768 (A.F.C.M.R. 1983).

22 M.J. at 683.

We think the United States Air Force Court of Military Review gave the issue of improper closing argument "full and fair consideration," as required by *Burns v. Wilson, supra*, and also gave "adequate consideration" to the issue and applied "proper legal standards," as required by our *Dodson v. Zelez, supra*. Such being the case, the district court erred in granting habeas corpus relief based on improper prosecutorial closing argument.

As indicated, in addition to the improper closing argument issue, Lips also asserted as a basis for habeas corpus relief the prosecutor's cross-examination relating to his post-arrest silence. At trial, defense counsel made only one nonspecific objection to this line of questioning. Mil. R. Evid. 103(a)(1), like Fed. R. Evid. 103(a)(1), requires a timely and specific objection to inadmissible testimony. Moreover, counsel did not raise the issue of improper cross-examination on appeal to the United States Air Force Court of Military Review. Because defense counsel did not make a timely and specific objection to the prosecutor's cross-examination at trial and also did not assert the issue of improper cross-examination on appeal, we deem the matter as one which was not raised in the military courts.

To obtain federal habeas review of claims based on trial errors to which no objection was made at trial, or of claims that were not raised on appeal, a state prisoner must show cause excusing the procedural default and actual prejudice resulting from the error. *Murray v. Carrier*, 477 U.S. 478, 491 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). That same rule was applied by us in *Wolff v. United States*, 737 F.2d 877 (10th Cir. 1984),

wherein a federal habeas corpus procedure challenge was made to a court-martial conviction. Nothing in the record before us indicates that there was any "excuse" for either of these procedural defaults, and hence the "cause and actual prejudice" standard was not met. Accordingly, the claim of improper cross-examination will not be reviewed "on the merits" in the present federal habeas corpus proceeding. *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986).[2]

By cross-appeal, Lips seeks review of the district court's holding that the use at trial of sexually explicit material taken from his apartment shortly after his arrest did not render his court-martial "fundamentally unfair." A reading of the opinion of the United States Air Force Court of Military Review indicates clearly that that court fully and fairly considered, and then rejected Lips' claim that the sexually explicit material taken from his apartment was improperly admitted into evidence. 22 M.J. at 681-83. Such being the case, the federal district court should not have made further inquiry.

Judgment reversed and cause remanded with direction to the district court to deny the petition.

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[2] Even assuming that counsel's objection at trial to the prosecutor's cross-examination was adequate and further assuming that the matter of improper cross-examination was presented to the United States Air Force Court of Military Review, the fact that the court did not specifically address the question of improper cross-examination in its opinion is not controlling. That court did specifically state that it had "examined the remaining assignments of error and resolved them against the appellant." In *Watson*, we stated that "[w]hen an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion." 782 F.2d at 145.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF KANSAS

Case No. 88-3396-R

WILLIAM M. LIPS,
Petitioner,

v.

COMMANDANT, USDB,
Respondent.

MEMORANDUM AND ORDER

[Filed July 31, 1992]

This matter comes before the court on petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Petitioner, an inmate at the United States Disciplinary Barracks, Leavenworth, Kansas, was convicted of rape, nonconsensual sodomy, assault, assault with a dangerous weapon, and battery, and was sentenced to twenty-five (25) years imprisonment on September 1, 1984.

In this action, petitioner challenges his conviction and asserts: (1) the trial court erred when it admitted into evidence a sexually explicit video tape and four sexually explicit magazines; and (2) his constitutionally guaranteed right to remain silent under the Fifth Amendment was violated when trial counsel (prosecutor) impermissibly, and repeatedly, questioned him on cross-examination about his post-arrest silence. Counsel also commented during closing argument on petitioner's silence.

Having reviewed the record in this matter, the court makes the following findings and order.

Factual Background

In June, 1984, petitioner was serving on active duty in the United States Air Force at Hahn Air Force Base, Federal Republic of Germany. On June 4, 1984, while petitioner's wife was in Texas, Cynthia Carite came to petitioner's home for dinner. During the course of the evening, sexual intercourse and sodomy occurred. Petitioner claimed the events, which included bondage, oral sex, and physically harsh behavior, such as spanking, were consensual. Carite contended petitioner forced her at gunpoint and knifepoint to perform the acts described.

On September 1, 1984, petitioner was convicted of rape, nonconsensual sodomy, assault, assault with a dangerous weapon, and battery. He was sentenced to: reduction to the lowest enlisted grade (E-1), forfeiture of all pay and allowances, a dishonorable discharge, and confinement for a period of twenty-five (25) years. On June 19, 1985, the sentence was approved except for a reduction in the term of confinement to twenty (20) years.

Petitioner properly appealed his case to the Air Force Court of Military Review (AFCMR) citing five (5) errors, including the two (2) currently before this court on his habeas petition. The AFCMR affirmed petitioner's conviction and sentence. *United States v. Lips*, 22 M.J. 679 (AFCMR 1986). The court found that the sexually explicit material was properly admitted. The court also found that petitioner's claim of impermissible prosecutorial comment on his post-arrest silence had been waived for failure to object at trial. Petitioner's motion for grant of review was denied by the United States Court of Military Appeals (CMA). *United States v. Lips*, 24 M.J. 45 (USCMA 1987). A petition for reconsideration was also denied. *United States v. Lips*, 24 M.J. 203 (USCMA 1987). Petitioner's motion for a new trial was denied by the Judge Advocate General of the Air Force on August 13, 1987.

Petitioner commenced this action on October 27, 1988.

Discussion

Petitioner's first claim is that the trial court erred when it admitted into evidence the sexually explicit videotape and magazines. Any errors in the admissibility of evidence are not grounds for habeas relief absent a showing that the trial was so fundamentally unfair that it constitutes a denial of due process. *Martin v. Kaiser,* 907 F.2d 931, 934 (10th Cir. 1990). With respect to claims which assert a denial of due process, this court will not question the evidentiary or procedural rulings of the trial court unless petitioner can show that, because of the court's actions, his trial, as a whole, was fundamentally unfair. *Tapia v. Tansy,* 926 F.2d 1554, 1557 (10th Cir.) *cert. denied,* —— U.S. ——, 112 S.Ct. 115 (1991).

Petitioner claimed the introduction of the sexually explicit evidence was highly prejudicial. This, however, is usually true of any relevant evidence. The trial judge admitted the evidence to show motive, intent, plan, and design.

Petitioner has failed to show that the trial judge's ruling resulted in a fundamentally unfair trial. This court finds petitioner's first claim is without merit.

Petitioner's second claim is more problematic and one which this court believes requires it to grant the writ.

The court acknowledges that its review of a claim made in a military habeas corpus petition is limited. In *Dodson v. Zelez,* 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Tenth Circuit Court of Appeals identified the four factors necessary for a determination of whether review of a military conviction on habeas corpus is appropriate. The factors to be considered are: (1) the asserted error must be of substantial constitutional dimension; (2) the issue must be one of law rather than of disputed fact already determined by the military tribunal; (3) military considerations may warrant different treat-

ment of constitutional claims; and (4) the military court must give adequate consideration to the issues involved and apply proper legal standards. *Id.*

First, there can be little question that the asserted error, impermissible comment on petitioner's post-arrest silence, is of substantial constitutional dimension. Once a suspect has been apprised of his rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), he is assured that his silence will not be used against him.[1] The use of his silence to impeach his testimony at trial is fundamentally unfair and violates the protection provided by the Fifth Amendment. *United States v. Barton*, 731 F.2d 669, 675 (10th Cir. 1984).

Second, the issue before the court is clearly one of law rather than a fact question previously determined by the military tribunal.

Third, this court finds no unique military consideration which apply to this issue.

Finally, this issue was raised before the military courts of review, but those courts found the issue had been waived for lack of a contemporaneous objection. Although this summary dismissal might not in itself justify this court's review, when considered with the other three factors, the court holds this claim meets the requirements for review. *Dodson* at 1253.

The test, in this circuit, for determining whether there has been an impermissible comment on a defendant's right to remain silent at the time of, and subsequent to, his arrest is "whether the language is manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." *U.S. v. Mora*, 844 F.2d 233, 235 (10th Cir.) *cert. denied Mora v. United States*, 488

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[1] The equivalent of the *Miranda* warnings in the military is found in Article 31(b) of the Uniform Code of Military Justice.

U.S. 995 (1988). Furthermore, "the court must look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact on the jury." *Id.* If some other equally plausible explanation exists for the prosecutor's comments, manifest intent will not be found. *Id.*

A review of the transcript in this case reveals numerous occasions during cross-examination where the prosecutor repeatedly referred to petitioner's failure to "tell anyone his story until now." During cross-examination of petitioner, the following questions and answers took place:

> Q. And you waited to talk about it until today for the reason you told us, because it seemed to you to be a good idea, and your lawyers told you it was a good idea, correct?
>
> A. I waited to tell you about it today, Sir?
>
> Q. Talk to anybody about it.
>
> A. There was no way I could have told anybody—anybody about this from the get-go. There's no way I could tell anyone anything.
>
> Q. You don't think that the OSI would have talked to you? You don't think I would have talked to you? You don't think Captain Basten would have talked to you? You don't think that the jailer would have talked to you? . . .
>
> Q. In fact, unlike you, the victim in this case has talked about this over and over and over and over again, to OSI agents, to people involved in the government's side of this case, to your lawyers, at an Article 32 Investigation, over and over and over again. She talked—
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> (Transcript, Vol. IX, p. 965-66).

At pages 1090-91 the following exchange occurs:

> Q. Sergeant Lips (sic), you sat on this witness stand on Saturday and just as you told these people

for the first time to any government authorities of any kind—certainly, for the first time to me—you told this story, correct?

A. I did not tell you that was the first time I told any government authorities.

Q. What government authorities have you told it to before?

A. Captain Marlow.

Q. Who is your defense counsel.

A. Yes, sir.

Q. Who you understand operated only in your interest, correct?

A. Correct. . . .

Q. And that's why you told it to him as opposed to any of these people that you wouldn't talk to, correct?

(Transcript, Vol. X, p. 1090-91).

The court notes there are numerous other exchanges throughout the transcript where direct comment was made concerning petitioner's post-arrest silence. Perhaps the most compelling example is found at page 1238 of the transcript:

Q. You know what's going on here is that you have chosen not to talk about this for the reasons that you told us because it was the advice of counsel and because you though it was in your best interests. But you also know that if you wanted to talk about it, you could have each and every day. You could have talked to me. You could have talked to Captain Basten. You could have talked to the OSI. You could have talked to your commander. You could have talked to any number of people. Now isn't that true in spite of what you sat here a minute ago and said? Isn't that very simply the situation that you've been in?

(Transcript Vol. XI, p. 1238).

Using the test stated in *Mora*, this court concludes that the manifest intent of the prosecutor was to comment on the petitioner's post-arrest silence and, thus, attack his credibiliy. Furthermore, the natural and necessary impact is that the jury would draw the conclusion that the comments and questions concerned petitioner's right to remain silent.

The court can find no other plausible explanation for the prosecutor's comments. The government, in its brief, argues that petitioner's counsel invited these comments by asking on direct examination whether this was the first time petitioner had told his story to the government officials. (Transcript, Vol. IX, p. 838). The government cites no case authority to support its argument.

This circuit has held that under certain circumstances defense counsel may invite prosecutorial comment on defendant's post-arrest silence and that such an invitation leads to harmless error. In *U.S. v. Pino*, 827 F.2d 1429 (10th Cir. 1987), defense counsel asked on direct examination why petitioner had not told the arresting officer the truth when he was picked up. Defense counsel further asked defendant why he had not told the FBI the truth. A third time, defense counsel asked defendant about who questioned him and how he answered. *Id.* at 1432. When the prosecutor narrowly cross-examined on these questions, the court found no error. The court cautioned, however, that pursuit of any further questioning by the prosecutor would have resulted in impermissible comment on defendant's post-arrest silence. *Id.* at 1432.[2] Two important distinctions between *Pino* and

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[2] In *Greer v. Miller*, 483 U.S. 756, 766 (1987), the Court held that impermissible comment on defendant's post-arrest silence did not result in a violation of defendant's due process rights where the prosecutor asked only a single question, defense counsel lodged an immediate objection and the court gave an immediate curative instruction followed by a second curative instruction when the jury retired for deliberation.

the case before this court are that there was very strong, if not overwhelming evidence of defendant's guilt in *Pino* and the court gave a prompt curative instruction after which the government refrained from any additional comments on defendant's silence.

The court finds that *Pino* is clearly distinguishable on its facts and does not apply in this case. Defense counsel did not invite the impermissible and repeated comments by the prosecutor on petitioner's post-arrest silence.

In *Johnson v. Patterson*, 475 F.2d 1066, 1067 (10th Cir.) *cert. denied* 414 U.S. 878 (1973), the defendant, like petitioner, was accused of rape and acknowledged that sexual activity had taken place. He also testified the activity was consensual. During cross-examination, in much less egregious terms than in the case before this court, the prosecutor commented on defendant's failure to tell the police his story following his arrest. *Id.* During closing argument the prosecutor again commented on defendant's silence. The court held defendant's constitutional right to remain silent had been violated and affirmed the grant of the writ of habeas corpus. The court said: "It would indeed be irregular and anomalous to warn an accused that he had the right to remain silent, that if he says anything it may be used against him, however, if he does remain silent that too may be used against him." *Id.* at 1068.

The court believes that this case, like *Johnson*, was mainly a test of the credibility of the victim and the petitioner. In such a case, the prosecutor's impermissible comment on petitioner's post-arrest silence is even more damaging. In similar situations when juries have been presented with two versions of the same incidents, it has been held "where the case comes down to a one-on-one situation, i.e. the word of the defendant against the word of a key prosecution witness, and there is no corroboration on either side, the importance of the defendant's credibility becomes so significant that prosecutorial

error attacking that credibility cannot be considered harmless beyond a reasonable doubt." *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985).

The government argues that counsel's failure to object at trial waived the issue and the military review court so found. The record, however, shows one objection made by counsel. In addition, the military review court's order only spoke to the failure to challenge the statements made during argument. The court assumes that this refers to the prosecutor's statements during closing argument rather than questions during cross-examination Therefore, the objection made during cross-examination preserved the issue for review. In *Barton* the court held that even absent an objection at trial, the magnitude of the right to post-arrest silence constitutes plain error and the lack of an objection may be disregarded. 731 F.2d at 675. See *United States v. Howell*, 18 M.J. 573, 575 (military judge has duty to instruct on prosecutor's impermissible comment on defendant's post-arrest silence despite defense counsel's failure to object).

In this case, even if the court did not find the issue preserved, it finds that under plain error analysis, the continuous and repeated comment on petitioner's post-arrest silence was "obvious and substantial error that affected the fairness, integrity or public reputation of judicial proceedings." *U.S. v. Jefferson*, 925 F.2d 1242, 1254 (10th Cir.) *cert. denied* —— U.S. ——, 112 S.Ct. 238 (1991) citing *United States v. Guzman*, 781 F.2d 428, 431-32 (5th Cir.) *cert. denied* 475 U.S. 1143 (1986).[3] The prosecutor's repeated comments on peti-

[3] The court notes that this circuit, in *United States v. Massey*, 687 F.2d 1348, 1353 (10th Cir. 1982), has articulated five factors relevant to the determination of whether prosecutorial comment on post-arrest silence is harmless. These include: (1) the use to which the prosecutor puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence of guilt; (4) the intensity and frequency of the reference; and

tioner's post-arrest silence resulted in a violation of the constitutional rights guaranteed under the Fifth Amendment. Consequently, petitioner did not receive a fair trial and should be afforded a new trial.

IT IS THEREFORE BY THE COURT ORDERED that the government must provide petitioner with a new trial within 120 days or grant his release. The writ of habeas corpus is granted.

DATED: This 31st day of July, 1992, at Topeka, Kansas.

/s/ Richard D. Rogers
RICHARD D. ROGERS
United States District Judge

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(5) the availaiblity of the trial judge of an opportunity to grant a motion for a mistrial or to give curative instructions.

In this case, the prosecutor obviously used petitioner's post-arrest silence to attack his credibility. The evidence of guilt clearly depended upon whose story was believed. The prosecutor vehemently and continuously commented and questioned on the silence. The trial judge failed to interpose curative instructions.

The only factor which is questionable in this case is who elected to pursue the line of questioning. However, defense counsel's one rather ambiguous question on direct examination about whether this was the first time petitioner had told his story to government authorities did not warrant the barrage of comment and questions from the prosecutor.

On this record, the error cannot be deemed harmless.

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

No. 55284/AF

CMR 24883
U.S.

v.

WILLIAM M. LIPS

PETITION FOR RECONSIDERATION DENIED

April 17, 1987

On consideration of appellant's petition for reconsideration and motions to file documents and to file corrected page, it is ordered that the motion to file corrected page is hereby granted; that the motion to file documents is hereby denied; and that the petition is hereby denied.

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

No. 55284/AF

CMR 24883

U.S.

v.

WILLIAM M. LIPS

ORDERS DENYING PETITION FOR REVIEW

March 2, 1987

APPENDIX E

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 24883

UNITED STATES

v.

SENIOR MASTER SERGEANT WILLIAM M. LIPS,
FR 041-38-5639, United States Air Force

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2 May 1986

Appellate Counsel for the Accused: Mr. Vaughan E. Taylor and Mr. George Martin Kripner, Jacksonville, North Carolina 28540. Colonel Leo L. Sergi, Major Conrad C. Baldwin, Jr., Captain Timothy J. Malloy and Captain Charles L. Wille.

Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Andrew J. Adams, Jr., and Major David F. Barton.

Before HODGSON, FORAY and MICHALSKI Appellate Military Judges.

DECISION

HODGSON, Chief Judge:

This is an appeal from a conviction of rape, forcible sodomy and three allegations of assault culminating in an approved sentence of a dishonorable discharge, 20 years confinement, total forfeitures and reduction to airman basic. The appellant is a senior non-commissioned officer with years of outstanding service. The complaining witness is the dependent wife of a serviceman from whom she was in the process of divorcing although at the time of her encounter with the appellant she was living with

another airman. In affirming the conviction we deem it appropriate to discuss some of the assigned errors.

I

The victim's husband and the appellant were assigned to the same organization and it was at squadron parties that the appellant and the victim first met. She and her husband had been to the appellant's apartment for dinner several times, and on those occasions the appellant's wife was present. After the complainant and her husband separated, she would see the appellant and talk to him—sometimes at the on-base convenience store where she worked. On 3 June, the appellant asked her over for dinner the next evening. She accepted and told her boy friend where she was going, which was about two blocks away. When she arrived at the appellant's house at about 1730 hours and saw his wife was not there, she assumed Mrs. Lips was working and would be home later. While they were sitting in the living room, the appellant tossed her a magazine [1] and said, "Here read this while I go get . . . some appetizers." The article he wished read was entitled "Professor of Pleasure." When she started reading, the appellant put his arm around her shoulder and a knife to her neck, saying, "Drop your pants, shirt and bra." He bent her over the coffee table and tied her hands and legs to it. He then laid underneath her and performed an act of cunnilingus. Later, the appellant pointed a gun at her, said, "Are you ready for the appetizer" and indicated she was to perform fellatio on him. When she exhibited some reluctance, he told her, "[you have] until the count of five to get it in [your] mouth."

While this episode was continuing the appellant put devices on her breasts described as "nipple clamps." There was conflicting testimony as to how painful this apparatus was. He then hit her four or five times on the buttocks with a belt saying, "You can [perform fellatio]

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[1] Penthouse Variations, May 1984, pages 12-18.

better than that." This activity stopped when the phone rang and the appellant answered. When he finished the conversation he brought her a drink and followed her into the bathroom. In response to her query, "Why me?", the appellant replied, "Because you're the most perfect one—you're separated from your husband and living with another man." He indicated that "7 out 10 rapes go unreported." Subsequently, the appellant cooked a meal for himself and the victim.

Later, they went into the bedroom and engaged in sexual intercourse and mutual oral copulation. During this episode the appellant attempted anal sodomy using a lubricant from a blue and white tube; he was unsuccessful.

The victim left the appellant's apartment at about 2130 hours and went home. She said nothing about the incident to her boy friend until noon the next day when she told him about the incident and he convinced her to report the matter. Medical examination disclosed bruises on her buttocks "three fingers wide" and abrasions on her wrists consistent with being tied with a rope.

A search of the appellant's apartment disclosed a knife, a gun, "nipple clamps" and ropes. Over defense objection the trial judge admitted a video tape and five magazines containing explicit sexual behavior between men and women. The dominant theme of these publications is the physical and sexual abuse of women.

The appellant admitted that his sexual encounter with the complaining witness occurred on the day alleged, but testified that the entire episode was initated by her when she came to his apartment uninvited. It was she who agreed to do something "kinky" like asking him to "spank" her with a belt. It was her idea to use the "nipple clamps" and it was she who suggested anal sodomy which he declined. The appellant acknowledged he has a "bondage fantasy," and that he had lubricant in a blue and white tube at his apartment. He also stated the complaining witness suggested that "others" might enjoy

this type of activity for money. She then demanded $200.00, and when he refused, threatened to tell his wife and otherwise harm his career. After he gave her only $60.00, she said, "You will pay." He also offered testimony of the victim's next door neighbor who stated she heard the victim say, "Don't hit so hard," "Quit, it hurts" and "Stop." The witness attributed this conversation to some type of sexual activity.

Finally, the appellant offered extensive evidence as to his good character and reputation for truthfulness.

In rebuttal, the government established that it is not unusual for a rape victim to delay reporting the incident because of feelings of shame and belief that no one will accept what happened. Additionally, there was evidence by the victim's exspouse and current partner that her sexual preferences did not include being beaten or physically abused.

II

The appellant contends the trial judge erred in admitting a sexually explicit video tape and similar literature found in his apartment. He argues that Mil.R.Evid. 404(b)[2] does not apply as his possession of the seized material was lawful and not probative of any contested issue. He also urges that prejudicial effect of the challenged evidence is enormous. *See* Mil.R.Evid. 403.

The appellant is correct in that possession of sexually explicit materials is lawful. *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). He is also correct that the admission of such materials is prejudicial.

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[2] Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But this is true of any relevant evidence, and in order to be admissible under Rule 404(b) the evidence of "OTHER CRIMES, WRONGS OR ACTS" must: 1) Establish a matter in issue other than the accused's propensity to commit the crime charged; 2) The other acts are similar enough to be relevant; 3) The evidence of the other acts is clear and convincing; and 4) The probative value of the other acts is not substantially outweighed by the danger of unfair prejudice. *United States v. Tuchow*, 768 F.2d 855 (7th Cir.1985); *United States v. Beechum*, 582 F.2d 898 (5th Cir.1978). To resolve this assigned error we must examine the record in light of the criteria just stated.

Mil.R.Evid. 404(b) states that evidence of other acts are admissible to establish ". . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The rule provides examples of bases for admission of other acts rather than an exclusive list. By decision we have included *modus operandi*, *United States v. Barus*, 16 M.J. 624 (A.F.C.M.R. 1983), and the accused's consciousness of guilt, *United States v. Borland*, 12 M.J. 855 (A.F.C.M.R.1981), as other reasons for which other acts are admissible.

What matter in issue does the appellant's possession of materials depicting the sexual and physical abuse of women establish? The trial judge admitted the evidence as tending to establish motive, intent, plan and design. Commendably, he explained on the record why he concluded the probative value of the proffered evidence was not outweighed by the danger of unfair prejudice to the appellant. *See United States v. Holt*, 21 M.J. 946 (A.F.C.M.R.1986). Our task now is to determine whether the trial judge clearly abused his discretion in this regard. *United States v. Barus, supra; United States v. Byrd*, 771 F.2d 215 (7th Cir.1985).

Motive is that which incites or stimulates a person to do an act. *People v. Weiss*, 252 A.D. 463, 300 N.Y.S.

249 (1937). As such it is a state of mind tending to show the basis for that individual's behavior. *See United States v. Watkins*, 21 M.J. 224 (C.M.A.1986). The possession of graphically posed photographs showing women being sexually and physically abused is a clear indication of the appellant's emotional penchant for sexual aberration. *See State v. Bailey*, 125 Ariz. 263, 609 P.2d 78 App. 1980). Thus, the admission of this material would tend to supply a motive for the appellant to commit the acts alleged.

His trial theory, that the victim had consented to the sexual acts, was tantamount to a denial that he had intended to achieve oral copulation and sexual intercourse by force. The challenged evidence is admissible to establish his intent in this trial by corroborating the victim's testimony that she did not consent to the sexual acts. *People v. Jackson*, 110 Cal.App.3d 560, 167 Cal.Rptr. 915 (1980). Such evidence is relevant because most sex offenses occur in private and the determination of witness credibility is a crucial role. *People v. Thomas*, 20 Cal. 3d 457, 143 Cal.Rptr. 215, 573 P.2d 433 (1978).

The seized sexually-oriented material also tends to establish preparation for the charged offenses in the sense that he had photographic depictions available suggesting the activity in which he wished to participate. The photographs and the video tape depicted scenarios for nonconsensual sex. These materials together with the knife, gun, ropes, "nipple clamps," lubricant and magazine he initially provided the victim when she arrived, are all indicative of preparation and planning to achieve what the victim said occurred.

Of the remaining *Tuchow* factors, those left are also clearly established. There is no question that the sexual activity protrayed in the magazines and video tape and the offenses being tried are sufficiently alike to be relevant. The photographs shows women being sexually abused in a manner the victim claims happened to her.

Also, it is clear that the challenged evidence belonged to him—he admitted the material was his. We further conclude the evidence offered on the question of motive, intent, plan and design was relevant as it had "a tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Mil.R.Evid. 401.

Based upon the facts before us we hold the trial judge was within the broad discretion given him to admit the challenged evidence. We find no basis to overturn the lower court's ruling on this issue. *United States v. Richardson*, 764 F.2d 1514 (11th Cir.1985).

III

The appellant next argues that the trial judge erred when he allowed Doctor Freddy E. Drummond, a clinical psychologist with experience in counseling rape victims, to testify in rebuttal that a high number of rapes i.e., between approximately 70-90% go unreported or are delayed in being reported because the victim is ashamed or fearful that no one will believe her. It was the defense's position that Doctor Drummond had no special expertise in this area and relied on hearsay, i.e., books and articles to gain the necessary knowledge. In a collateral assertion of error the appellant also contends that the government should not have been permitted to offer, in rebuttal, testimony that the victim's sexual preferences did not include "rough sex."

The purpose of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party. *United States v. Shaw*, 9 U.S.C.M.A. 267, 26 C.M.R. 47 (1958). Certainly testimony by the victim's past and present sexual partners that she did not enjoy "rough sex" tends to negate evidence by the defense that she did. Further, Doctor Drummond is permitted under Mil.R.Evid. 703 to rely on facts and data known to him that are neither admitted nor admissible in

evidence, so long as they are of a type "reasonably relied upon by experts in the particular field in forming an opinion or inference upon the subject. *United States v. Neeley*, 21 M.J. 606 (A.F.C.M.R.1985); *see also United States v. Eastman*, 20 M.J. 948 (A.F.C.M.R. 1985). The admission or exclusion of evidence on rebuttal rests largely within the sound discretion of the trial judge which we find he properly exercised. *United States v. Posey*, 647 F.2d 1048 (10th Cir.1981).

IV

The appellant also contends he is entitled to a new trial because of improper findings and sentencing arguments by government counsel. Appellant's counsel entered no objection at trial to the now challenged statements made during argument. In view of this, we consider this issue to be waived on appeal in the absence of plain error which doctrine we find no basis here to invoke. R.C.M. 1001 (g); *United States v. Fisher*, 21 M.J. 327 (1986); *United States v. Fisher*, 17 M.J. 768 (A.F.C.M.R. 1938).

V

The appellant argues the evidence is insufficient to prove beyond a reasonable doubt that he is guilty of the offenses charged. He puts forth numerous reasons to support this argument. They are: the victim's testimony is so riddled with inconsistencies that it is not credible; his version of the incident, although it pictures him as less than an ideal husband, is very credible; he has an outstanding military record and a good reputation for truthfulness which lends weight to his version of the facts; and the victim is antagonistic toward him and claimed rape only after he refused to pay her the amount she demanded for the sexual services to which she willingly consented.

That a sexual encounter took place between the appellant and the victim is not disputed—the question is

whether she consented to his actions. When a crucial issue must be resolved in terms of essentially "a one-on-one confrontation," corroborative evidence of guilt is a factor to be weighed. *United States v. Pastor*, 8 M.J. 280 (C.M.A. 1980); *United States v. King*, 17 M.J. 1099 (A.F.C.M.R. 1984). The available corroborative evidence includes: the victim reporting the incident, albeit the next day, the gun, knife, ropes, and lubricant, sexually explicit video tape, and the sexually-oriented magazine the victim testified the appellant used in the assault were found in his apartment. The appellant's explanation of why he possessed these items was before the court.

Much of the crucial testimony offered by the appellant and the complaining witness is in toal conflict. She said he invited her to dinner that evening; he stated she came to his house uannounced. He testified she was the one who broached the subject of "kinky sex" i.e., being bound, beaten, anal sodomy and use of the "nipple clamps."; her version focused on the appellant using a knife and gun to force her to submit. It is readily apparent that the outcome of the trial rested on the weight the members chose to give to the testimony of each witness. *United States v. Lecappelain*, 9 M.J. 562 (A.F.C.M.R.1980).

We have a statutory mandate to review the evidence and in so doing we must judge the credibility of witnesses and determine controverted questions of facts, recognizing that the trial court saw and heard the witnesses. Article 66(c), U.C.M.J., 10 U.S.C. § 866(c). Proof beyond a reasonable doubt as to an accused's guilt does not mean that the evidence must be free of conflict. *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R.1984). This was a vigorously contested trial with both the appellant and the government offering a full measure of evidence to support their theory of the case. We have examined the record of trial and, like the trial court, we are convinced beyond a reasonable doubt that the appellant is guilty of the offenses alleged.

VI

We have examined the remaining assigned errors and resolve them against the appellant. *United States v. Whiting*, 12 M.J. 253 (C.M.A. 1982); *United States v. Henderson*, ACM 24341, 31 August 1984, *pet. denied*, 21 M.J. 38 (C.M.A.1985); see *United States v. Heriot*, 21 M.J. 11 (C.M.A. 1985).

VII

Finally, appellant defense counsel suggest that the approved sentence is inappropriately severe given the appellant's past outstanding military record. It is, of course, true that an outstanding military record is a mitigating factor in reviewing the appropriateness of a sentence. *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985). But the scales of punishment must also weigh the seriousness of the crime. Here the appellant has been convicted of a series of aggravated sex offenses with the same victim. Under the facts of this case we consider the approved sentence to be entirely appropriate. For the reasons stated the findings of guilty and the sentence are

AFFIRMED.

FORAY, Senior Judge and MICHALSKI, Judge, concur.

FILED
DEC 28 1993
OFFICE OF THE CLERK

No. 93-503

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM M. LIPS, PETITIONER

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to habeas corpus relief on the ground that the prosecutor at petitioner's court-martial questioned him about his post-arrest silence and commented on his post-arrest silence in closing argument.

2. Whether petitioner was entitled to habeas corpus relief on the ground that "other acts" evidence was admitted at petitioner's court-martial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-8a, is reported at 997 F.2d 808. The opinion of the district court on habeas corpus, Pet. App. 9a-18a, is unreported. The opinion of the Air Force Court of Military Review affirming petitioner's conviction, Pet. App. 21a-30a, is reported at 22 M.J. 680. The order of the Court of Military Appeals denying discretionary review, Pet. App. 20a, is noted at 24 M.J. 45.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The petition for a writ of certiorari was

filed on September 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1984, at Hahn Air Force Base in Germany, petitioner was convicted by a military court-martial of rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920; forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. 925; and three counts of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. 928. He was sentenced to a dishonorable discharge, 20 years' confinement, total forfeiture of pay and allowances, and a reduction in rank. The Air Force Court of Military Review affirmed petitioner's conviction and sentence, Pet. App. 21a-30a, and the Court of Military Appeals denied discretionary review, *id.* at 20a.

Petitioner subsequently filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas. The district court granted the petition, Pet. App. 9a-18a, but the court of appeals reversed and directed the district court to deny the petition, *id.* at 1a-8a.

1. On June 3, 1984, petitioner, a member of the United States Air Force, invited Cynthia Carite to his quarters for dinner while his wife was away. After showing Carite a sexually explicit magazine entitled *Penthouse Variations*, petitioner forced Carite to undress, tied her to a coffee table, and sodomized and raped her, threatening her first with a knife and then with a gun. Petitioner then placed "nipple clamps" on Carite's breasts and beat her with a belt, after which he forced her to engage in further sexual acts. After dinner, petitioner again raped

Carite, engaged in oral sex, and unsuccessfully attempted to have anal intercourse with her. Pet. App. 22a-23a.

The following day, Carite reported the crime to the authorities. Military law enforcement agents arrested petitioner and informed him of his right against compelled self-incrimination. Petitioner declined to make a statement. In a search of petitioner's residence, the agents seized a videotape and five magazines containing depictions of explicit sexual behavior. The dominant theme of those materials was the physical and sexual abuse of women. Pet. 5; Pet. App. 3a, 23a.

2. At petitioner's court-martial, the military judge admitted the sexually explicit videotape and some of the magazines into evidence over petitioner's objection that their admission violated the ban on "other crimes" evidence under Mil. R. Evid. 404(b). Pet. App. 24a-25a.

In its case-in-chief, the government did not present evidence of petitioner's pretrial silence. During the defense case, however, petitioner's attorney asked him whether he had previously told his side of the story to a government official. Petitioner replied that he had not, and he then explained that he had wanted to talk about the incident but was advised by his attorneys to remain silent. Petitioner then testified that Carite had initiated the steps that led to their engaging in a variety of sexual acts. Petitioner claimed that Carite falsely accused him of rape after she asked him for $200 in exchange for the sexual acts she had performed, but he gave her only $60. Pet. 6; Pet. App. 3a, 23a-24a.

On cross-examination, the prosecutor attempted to show that the real reason petitioner made no post-arrest statement was that he wanted to hear the government's evidence and Carite's testimony before giving anyone his version of events so that he could tailor his testimony to make it more believable. Petitioner's counsel did not object to that line of cross-examination on Fifth Amendment grounds. Counsel's only objection during the prosecutor's questions on that subject was an unspecific objection to a compound question asked by the prosecutor. Pet. 7-8.

During closing argument, the prosecutor stated that while petitioner's pretrial silence was not evidence of his guilt, petitioner had waited until trial to tell his story so that he could first hear Carite's testimony. Petitioner did not object to that argument. *Id.* at 8-9.

3. On appeal to the Air Force Court of Military Review, petitioner raised 12 issues. As one of those issues, he challenged the admission of the sexually explicit videotape and magazines, arguing that they were not admissible as "other crimes" evidence under Mil. R. Evid. 404(b), and that their prejudicial impact substantially outweighed their probative value under Mil. R. Evid. 403. As another issue on appeal, petitioner contended that the prosecutor improperly commented on his pretrial silence in violation of this Court's holding in *Doyle* v. *Ohio*, 426 U.S. 610 (1976).[1] Petitioner framed the issue as follows:

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[1] In *Doyle*, this Court held that due process bars the government from impeaching a defendant with his post-arrest silence if he was advised at that time of his right to remain silent.

> Reversible error occurred during * * * argument by trial counsel as to the following: (A) improper comment on [petitioner's] exercise of his right to remain silent prior to trial; (B) improper and inflammatory argument by trial counsel; and (C) improper statements of law during argument, to include, but no[t] limited to, shifting the burden of proof onto [petitioner].

Pet. C.A. App. 63. In the argument portion of his brief, petitioner contended that the prosecutor improperly referred to his pretrial silence in closing argument; as part of his argument in support of that contention, petitioner referred briefly to the prosecutor's cross-examination in which the prosecutor questioned petitioner about his post-arrest silence. *Id.* at 64-69. In response, the government contended that the sexually explicit material had been properly admitted into evidence and that petitioner had waived the *Doyle* issue by not objecting at trial. See Gov't C.A. Br. 8-10.

4. The Air Force Court of Military Review affirmed petitioner's conviction. Pet. App. 21a-30a. The court held that the military judge did not abuse his discretion by admitting the sexually explicit videotape and magazines. *Id.* at 27a. The court stated that the material was relevant to show petitioner's motive, intent, and preparation, and to corroborate the victim's testimony. *Ibid.* In particular, the court determined that the evidence was relevant because some of the sadomasochistic acts depicted in the materials were similar to petitioner's sexual acts with Carite. *Id.* at 26a.

The Court also rejected petitioner's *Doyle* claims, noting as follows (Pet. App. 28a):

> [Petitioner] also contends he is entitled to a new trial because of * * * sentencing arguments by government counsel. [Petitioner's] counsel entered no objection at trial to the now challenged statements made during argument. In view of this, we consider this issue to be waived on appeal in the absence of plain error, which doctrine we find no basis here to invoke.

The Court of Military Appeals denied petitioner's request for review without opinion. Pet. App. 20a.

5. In 1988, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, alleging that the military judge had improperly admitted the sexually explicit videotape and magazines and that the prosecutor had improperly commented on his post-arrest silence. Pet. 2; Pet. App. 9a-10a. On July 31, 1992, the district court granted the writ. Pet. App. 18a. With respect to the sexually explicit materials, the court found that petitioner had "failed to show that the admission of those materials resulted in a fundamentally unfair trial." *Id.* at 11a. The court held, however, that the prosecutor violated petitioner's Fifth Amendment rights by questioning petitioner on cross-examination about his post-arrest silence. *Id.* at 15a. The court found the general objection during the cross-examination sufficient to preserve the *Doyle* issue and concluded, alternatively, that the "lack of an objection may be disregarded" as "plain error." *Id.* at 17a.

6. The court of appeals affirmed in part, reversed in part, and directed the district court to deny the petition. The court of appeals found that the Air Force courts, in determining that the prosecutor's argument was not plain error, applied proper legal

standards and gave "full and fair consideration" to that issue. The court further held that petitioner did not adequately preserve the improper cross-examination issue in the military courts. The court noted that petitioner made no timely and specific objection to the prosecutor's cross-examination at trial, and that he made only a brief reference to the cross-examination issue in his brief on appeal. Because petitioner had forfeited that claim below, and because he failed to show "cause and actual prejudice" for his default, the court of appeals held that he was not entitled to habeas relief. Pet. App. 7a-8a.

Finally, the court of appeals affirmed the district's court decision denying petitioner habeas corpus relief on the sexually explicit materials claim. The court of appeals concluded that the military courts had fully and fairly considered petitioner's claim concerning the admission of those materials and that there was therefore no need for further inquiry on that issue. Pet. App. 8a.

ARGUMENT

Petitioner contends that the court of appeals applied an unduly restrictive standard for habeas corpus review of military convictions, and that the court therefore erroneously refused to grant him relief from those convictions.[2]

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[2] Petitioner argues in a footnote (Pet. 18 n.9) that this case should be held pending the Court's decision in *Weiss* v. *United States*, cert. granted, 113 S. Ct. 2412 (1993) (No. 92-1482), which presents the questions whether the designation and selection of military judges satisfies the Appointments Clause and whether due process requires a fixed term of office for military judges. Because petitioner did not raise those issues in the military courts, the district court, or the court of appeals,

1. In *Burns* v. *Wilson*, 346 U.S. 137 (1953), this Court set forth the standard for habeas corpus review of military convictions. The Court held that because the military criminal justice system "exists separate and apart from the law which governs in our federal judicial establishment," *id.* at 140, and because Congress has provided that the determinations of military courts are "final" and "binding" upon all courts, *id.* at 142, citing Art. 76, UCMJ, 10 U.S.C. 876, it is "not the duty of the civil courts * * * to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus." *Id.* at 144. Rather, it is "the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims." *Ibid.* That is, "when a military decision has dealt fully and fairly with an allegation raised in [a habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* at 142.[3]

The *Burns* test, referred to as the "full and fair consideration" standard, has consistently been applied by federal courts in disposing of military habeas corpus petitions. Although courts have at

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they are waived here. See *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).

[3] The quoted language is from the plurality opinion of Justice Vinson for four Members of the Court. Justice Minton concurred in the result, 346 U.S. at 146-148, but because he favored a more restrictive standard of review, it is clear that a majority of the Court regarded the standard in the plurality opinion as setting the limit on the extent to which a habeas court could review military convictions.

times encountered difficulties in determining how that standard should be applied in particular cases, see *Allen* v. *VanCantfort*, 436 F.2d 625, 629-630 (1st Cir.) (noting difference among courts in construing *Burns* test), cert. denied, 402 U.S. 1008 (1971), there has been no significant divergence of views as to whether that standard is the appropriate test for habeas review of military convictions.[4] In particular, the court of appeals in this case adopted the standard that has emerged as the leading articulation of the *Burns* test. See Pet. App. 5a-6a. Under that standard, a habeas court can review not only whether the military courts have given adequate consideration to a particular claim, but also whether the military courts have applied the proper legal principles in addressing that claim. See *Khan* v. *Hart*, 943 F.2d 1261, 1262-1263 (10th Cir. 1991); *Dodson* v. *Zelez*, 917 F.2d 1250 (10th Cir. 1990); *Monk* v. *Zelez*, 901 F.2d 885, 888 (10th Cir. 1990); *Calley* v. *Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976); *Daigle* v. *Warner*, 348 F. Supp. 1074, 1078 (D. Haw. 1972), rev'd on other grounds, 490 F.2d 358 (9th Cir. 1973).[5]

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[4] In some of the cases that petitioner cites (Pet. 21 n.17), the courts have not addressed the question of the proper standard to apply. Those cases therefore do not bear on the question of the appropriate standard for habeas corpus review. Other cases have involved challenges to court-martial proceedings by means other than habeas corpus; those decisions are thus of limited relevance to the question of the proper scope of habeas corpus in challenges to military convictions. See *Shaw* v. *United States*, 357 F.2d 949, 953 & n.4 (Ct. Cl. 1966), and cases cited therein (claims for back pay for wrongful dismissal).

[5] All but one of the cases cited by petitioner in support of his claim that the courts of appeals disagree about the proper

Because the court of appeals' articulation of the "full and fair consideration" standard requires that the military courts both consider the issue in question and apply the correct legal standard in doing so, petitioner is wrong in characterizing the standard applied by the court of appeals as being "that once an issue is briefed and argued before a military court, it is considered to be fully and fairly considered by the military courts." Pet. 22. For the same reason, he is incorrect in asserting that the Tenth Circuit's standard of review is "so restrictive that it virtually eliminates federal court review of military court decisions in the Tenth Circuit and renders the right of service members to habeas corpus relief in the Tenth Circuit nonexistent." Pet. 24. As this case illustrates, the Tenth Circuit standard provides for collateral review of military proceedings when the habeas petitioner raises substantial constitutional claims based on legal, rather than factual, grounds. See, *e.g.*, *Khan* v. *Hart*, 943 F.2d 1261, 1263-1265 (10th Cir. 1991) (reviewing legal issues raised by non-delegation doctrine); *Dodson* v. *Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (reviewing court-martial voting

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application of the "full and fair consideration" test (see Pet. 21-22) pre-date the Fifth Circuit's 1975 en banc decision in *Calley* v. *Callaway*, *supra*, in which that court discussed the issue at length and adopted the standard that has since been applied regularly in military habeas corpus cases. The one post-1975 case that petitioner cites is *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981), a declaratory judgment action in which the court of appeals addressed and denied a purely legal challenge to the constitutionality of the provision of the Uniform Code of Military Justice on which his court-martial conviction was based.

procedures); *Mendrano* v. *Smith*, 797 F.2d 1538, 1542 n.6 (10th Cir. 1986).[6]

2. Even if there is some divergence among the courts of appeals as to how the *Burns* test should be applied in particular cases, the resolution of the two issues presented in this case would be the same regardless of the precise articulation of the test for habeas review of military judgments. The court refused to reach the merits of petitioner's Fifth Amendment claims because petitioner failed to show "cause and actual prejudice" to excuse his failure to preserve those claims in the military court system. And the district court denied petitioner's evidentiary claim after applying an even more lenient standard of review, a standard that even petitioner does not claim was unduly restrictive.

a. Petitioner defaulted on his Fifth Amendment claims in the military courts, and he has shown no reason why he should be relieved of that default for purposes of habeas corpus. It is well settled that, even in civilian habeas corpus proceedings, a defendant may not raise on collateral attack an issue that he did not preserve for appeal by making a contemporaneous objection at trial unless he can show cause for his default and actual prejudice resulting from the

[6] Petitioner argues that the Fifth Circuit, in *Calley* v. *Callaway*, *supra*, suggested a standard of review that reaches the merits of constitutional claims even when those claims were given plenary consideration by the military appellate courts. Petitioner fails to point out, however, that in *Dodson* v. *Zelez*, 917 F.2d 1250 (10th Cir. 1990), the Tenth Circuit explicitly adopted the standard set out in *Calley*, and that the court of appeals applied that standard in this case. See Pet. App. 5a-6a, 11a-12a.

error in question. See *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (pretrial right to silence claim). See also *Wolff* v. *United States*, 737 F.2d 877 (10th Cir.) (applying cause and actual prejudice standard in review of military habeas petition), cert. denied, 469 U.S. 1076 (1984).

By failing to object on Fifth Amendment grounds to the prosecutor's cross-examination or closing argument, petitioner forfeited his claim that the prosecutor violated *Doyle* by improperly commenting on his post-arrest silence. His single, unspecific objection during the middle of the prosecutor's cross-examination was inadequate to preserve the *Doyle* issue for review. See Mil. R. Evid. 103(a)(1). Furthermore, as noted by the court of appeals, Pet. App. 7a, petitioner's failure to present the question of the prosecutor's cross-examination as an issue on appeal to the Air Force Court of Military Review constituted a second default; the court properly found that the abbreviated reference to the cross-examination in his brief on appeal to that court was inadequate to preserve the issue, and it explained why the court of military review did not address that issue separately from the *Doyle* claim based on the prosecutor's closing argument.[7] Since petitioner has never established

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[7] Petitioner relies (Pet. 26-27) on *United States* v. *Arnold*, 425 F.2d 204 (10th Cir. 1970), to argue that the court of appeals should have considered his *Doyle* claim in spite of the absence of a proper objection at trial. *Arnold*, however, applied the plain error doctrine on direct appeal from a conviction. *Id.* at 206. But the plain error doctrine is inapplicable on collateral attack. Even in the civilian system, a habeas petitioner must meet the

either "cause" or "actual prejudice" for his default, he was not entitled to raise the *Doyle* issue on collateral attack of his court-martial conviction.[8] See Pet. App. 8a.

Second, petitioner, not the government, initiated the inquiry into his post-arrest silence during direct examination and renewed that inquiry on redirect examination. Petitioner's counsel apparently thought that it was important for petitioner's defense of consent to bring out the fact that petitioner had not made a statement at the time of his arrest and to

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more stringent "cause and actual prejudice" test. See *Frady*, 456 U.S. at 164. Petitioner also suggests (Pet. 27-28) that *Doyle* itself does not require an objection at trial to preserve the issue on appeal or collateral attack. *Doyle*, however, was a direct appeal, and the defendants objected to the prosecutors' comments on their post-arrest silence. 426 U.S. at 614-616. Nothing in *Doyle* or any other decision of this Court suggests that a *Doyle* error can be raised for the first time on appeal or on collateral attack.

[8] Petitioner's attempt to extend the holding of *Doyle*, which barred the prosecutor from initiating an inquiry into the defendant's post-arrest silence, to a case in which the defendant initiates the inquiry into his post-arrest silence as a matter of trial tactics, violates the ban on using habeas corpus to create a "new rule" of law. A habeas petitioner seeks a "new rule" if his claim was not dictated by existing precedent at the time of his conviction or if his interpretation of the law was susceptible to debate among reasonable minds at the time his conviction became final. See *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990); *Butler* v. *McKellar*, 494 U.S. 407, 413-415 (1990). Petitioner's extension of *Doyle* to cases in which the defendant first raises the issue of his post-arrest silence is certainly not dictated by *Doyle* itself; at the very least, it is debatable whether that extension of *Doyle* is compelled by the principles the Court developed in *Doyle*.

elicit petitioner's explanation of why he had not done so. But having raised the issue of his post-arrest silence and having given his explanation for it, petitioner could not then deny the prosecutor an opportunity to probe the issue on cross-examination and address it during closing argument. See *United States* v. *Pino*, 827 F.2d 1429, 1432 (10th Cir. 1987); *Lebowitz* v. *Wainwright*, 670 F.2d 974, 980-981 (11th Cir. 1982). See also *United States* v. *Robinson*, 485 U.S. 25, 32 (1988) (no Fifth Amendment violation where prosecutor merely responded to defendant's comment on his right to remain silent).

b. Petitioner also contends that the court of appeals erred by not reviewing on the merits his claim that the military judge improperly admitted evidence that he possessed sadomasochistic materials. Even on habeas corpus review of federal and state convictions, courts do not review the admission of other crimes evidence at a criminal trial *de novo*. Instead, such review is limited to whether the admission of that evidence resulted in a fundamentally unfair trial in violation of due process. See *Estelle* v. *McGuire*, 112 S. Ct. 475, 480-482 (1991). Here, the district court specifically held that the admission of the sexually explicit materials at petitioner's court-martial did not result in a fundamentally unfair trial. Pet. App. 11a; see also *id.* at 24a-27a (concluding that the probative value of the sexually explicit materials was not outweighed by its prejudicial value).

Although petitioner contends that the sexually explicit materials were not relevant to any material issue at trial, they were actually highly relevant. The *Penthouse Variations* magazine was relevant because, according to Carite, petitioner showed her

that magazine immediately before forcing himself on her. The introduction of the magazine thus corroborated the details of her story and supported her account that petitioner took the initiative in raising the subject of sex. The remaining magazines and the videotape, which were predominately sadomasochistic in theme, were particularly relevant, since petitioner's sadomasochistic rape and sodomy of Carite mirrored some of the acts portrayed in the magazines and the videotape. Proof that petitioner possessed those materials tended to show that petitioner raped and sodomized Carite to fulfill his aberrant sexual desires, and to rebut petitioner's contention that Carite had initiated sadomasochistic sex between them.[9] Petitioner is therefore not entitled to relief on either of the grounds on which he challenges his court-martial conviction.

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[9] Petitioner contends (Pet. 29-30) that the decision of the courts below upholding the admission of the sexually explicit materials conflicts with *Lovely* v. *United States*, 169 F.2d 386 (4th Cir. 1948). *Lovely* was a rape case in which the defendant alleged consent. Over the defendant's objection, the prosecution presented evidence that the defendant had raped another woman. The Fourth Circuit reversed the conviction, holding that evidence of the other rape should not have been admitted because it was not relevant to any material issue in the case. In this case, by contrast, the materials that focused on sexual abuse of women tended to support Carite's story of the rape and other sexual assaults. What is more, because this case was on habeas corpus the district court limited its inquiry to whether the admission of the evidence rendered the trial fundamentally unfair, not, as in *Lovely*, whether the evidence was admissible under the rules of evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993

Supreme Court, U.S.
FILED
JAN 12 1994
OFFICE OF THE CLERK

No. 93-503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WILLIAM M. LIPS,
Petitioner,

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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Date: January 12, 1994

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QUESTIONS PRESENTED

I.

Whether an Article III judge—who grants a petition for a writ of habeas corpus on finding that a serviceman's constitutional rights were violated at his court-martial—erred in considering the writ because a military court "fully and fairly" considered the constitutional issues and found no error.

A.

Whether an Article III judge—who grants a serviceman's petition for habeas corpus on finding that the prosecutor's extensive references to the serviceman's post-arrest silence during *cross-examination* and *closing argument* constituted plain error—erred in granting the writ because a military court "fully and fairly considered" the constitutional issue and found no error.

B.

Whether an Article III judge—who considers a serviceman's petition for habeas corpus alleging he was denied due process of law at his trial because specific intent evidence, that is, evidence of motive, intent, plan, and design, was improperly admitted to prove general intent crimes—erred in considering the writ because a military court "fully and fairly considered" the constitutional issue and concluded that specific intent evidence was admissible to prove general intent crimes.

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The issue in this case concerns the scope of civilian court review of constitutional questions raised in military trials by young men and women serving in the armed forces of the United States.

A. Civilian Review of the Military

Civilian control of the military is one of the fundamental principles upon which the American Government is based. Like the executive and legislative branches, the judicial branch has a responsibility to exercise control over the military and it does so by ensuring that the constitutional rights of American service men and women are protected in military trials.

In Lips' case three military officers, temporarily assigned to perform duty on the Air Force Court of Military Review, decided that Lips' military trial was fair and that his constitutional rights under the Fifth Amendment of the Constitution were not violated.[1]

On reviewing the military court's decisions, an Article III judge concluded that Lips' constitutional right to remain silent under the Fifth Amendment was violated when the prosecutor in Lips' court-martial impermissibly, and repeatedly, questioned Lips on cross-examination about his post-arrest silence. Pet. at 17a-18a. Based on this finding, the Article III judge granted Lips' petition for a writ of habeas corpus and ordered that Lips be given a new trial because (1) "the prosecutor obviously used peti-

[1] In three sentences the military judges decided that the prosecutor's improper comments on findings and sentencing argument did not violate the Fifth Amendment under *Doyle*, but the military judges did not decide the issue of whether the prosecutor's improper comments during cross-examination violated the Fifth Amendment. Pet. at 28a, IV.

The United States Court of Military Appeals denied Lips' petition for review of these constitutional issues. Pet. at 20a.

tioner's post-arrest silence to attack [Lips'] credibility," (2) the "evidence of guilt clearly depended upon whose story was believed"; and (3) the "prosecutor vehemently and continuously commented and questioned on the silence." *Id.* at 18a n.3.

This is precisely how civilian control of the military by the federal judiciary is intended to operate. When a service member raises an important constitutional issue in the military system, exhausts his or her military remedies, and does not obtain the relief warranted, the service member should be able to petition an Article III court for review. Where the servicemember's case has been reviewed only by military officers, there is an even greater need for members of the armed forces to have access to the civilian courts for a review of the constitutional rights denied them in military trials.

B. Full and Fair Consideration Standard

In granting the writ of habeas corpus in the present case, the District Court held that the "prosecutor's repeated comments on [Lips'] post-arrest silence" during cross-examination violated Lips' "constitutional rights guaranteed under the Fifth Amendment" and denied him "a fair trial." The District Court also ruled that the military court failed to fully and fairly consider the issue. Pet. 17a-18a.

In reversing the District Court's decision, the 10th Circuit Court of Appeals states that the military court fully and fairly considered the issue even though it did not address the issue in its opinion. Pet. at 8a n.2. "When an issue is briefed and argued before a military board of review," the 10th Circuit states, "we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not find the issue meritorious or requiring discussion." *Id.* citing *Watson v. McCotter,* 782 F.2d 143, 145 (10th Cir.), *cert. denied,* 476 U.S. 1184 (1986). Thus, because the issue was fully and fairly considered by the military court, the

10th Circuit Court of Appeals held that Lips was not entitled to relief. Pet. at 30a.

According to the 10th Circuit Court of Appeals, the District Court erred in holding that the "prosecutor's repeated comments on petitioner's post-arrest silence resulted in a violation of the constitutional rights guaranteed under the Fifth Amendment" because the Air Force Court of Military Review fully "consider[ed] the [cross-examination] issue in question" and applied "the correct legal standard in doing so," even if did not address the issue in its opinion. Pet. 17a-18a. *But see Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1380 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) ("*Burns* plurality does not preclude civil consideration of the constitutional defects alleged here" where it is not clear the issue was fully and fairly considered because no military court articulated an analysis of them).

The government concedes that federal "courts have at times encountered difficulties in determining how [the full and fair consideration] standard should be applied in particular cases, see *Allen v. VanCantfort*, 436 F.2d 625, 629-630 (1st Cir.) (noting difference among courts in construing *Burns* test), *cert. denied*, 402 U.S. 1008 (1971)." Resp. at 8-9. This difficulty is clearly evident in the present case where the District Court and the 10th Circuit Court of Appeals applied the same standard and came up with completely different results.

What is unfortunate about the inconsistent application by federal courts of the full and fair consideration standard is that when the standard is applied woodenly or inappropriately, young men and women serving in the armed forces of the United States like Lips, whose case was not reviewed by the United States Court of Military Appeals, are denied the right to *any* civilian review of the constitutional issues raised in their military trials.

C. Conflict in the Circuits

Other District Courts and other Circuit Courts of Appeals have experienced similar difficulties in applying the

full and fairness standard in habeas corpus cases. *See* Rich, *Federal Court Scope of Review Over Military Habeas Corpus Cases*, 6 MEMPHIS ST. U.L. REV. 83 (1975). In addition, there is no evidence that other civilian courts agree with the way the 10th Circuit Court of Appeals applies the full and fair consideration standard. Indeed, the evidence is to the contrary. *See e.g.*, cases cited at Pet. at 21-22 nn.16-18. Further, no other court of appeals has gone as far as the 10th Circuit Court of Appeals in holding that civilian court consideration of constitutional defects is precluded where a military court has fully and fairly considered the issues without analysis or opinion. *See Hatheway v. Secretary of the Army*, *supra*.

D. *Doyle* Issue

The government does not deny that a *Doyle* violation occurred in Lips' case. Indeed, the prosecutor's cross-examination in Lips' case is much like the prosecutor's cross-examination held unconstitutional by the Supreme Court in *Doyle*. *Compare* Pet. at 7-8 with *Doyle v. United States*, 426 U.S. 610, 613-14 (1976). In addition, the purpose expressed by the prosecutor for questioning Lips about his post-arrest silence is the same purpose which the Supreme Court held unconstitutional in *Doyle*. *Compare* Pet. at 27 and 4a with *Doyle v. United States*, 426 U.S. 610, 616-17 (1976).

E. Objection Preserving the *Doyle* Issue

The government dwells on defense counsel's sole objection to the prosecutor's line of questioning on cross-examination and ignores the fact that during the trial the prosecutor commented on Lips' right to remain silent more than 50 times in cross-examination and during closing argument.

1. *Sufficiency of the Objection*

The government argues that the defense counsel's "single, unspecific objection during the middle of the prosecutor's cross-examination was inadequate to preserve the *Doyle* issue for review" and cites Mil. R. Evid. 103

(a)(1). Resp. at 12. The specific question defense counsel objected to is as follows:

> Q. I didn't ask you that, Sergeant Lips. We went through that again. Do you want to do again? You don't think the OSI [criminal investigators] would have talked to you? You don't think I [the prosecutor] would have talked to you? You don't think Captain Basten [the assistant prosecutor] would have talked to you? You don't think the security police would have talked to you?
>
> A. Objection, Your Honor.

See Pet. at 7-8.[2] The question asked is clearly a comment on Lips' right to remain silent and is objectionable under *Doyle*.

Military Rule of Evidence 103(a) states that a timely objection must be made to an error "stating the specific ground of the objection, *if the specific ground [is] not apparent from the context*" of the question. Mil. R. Evid. 103(a)(1) (emphasis added).[3] In addition, Rule 103(d) of the Military Rules of Evidence states that "[n]othing in this rule precludes taking notice of *plain errors* that materially prejudice substantial rights although they were not brought to the attention of the military judge." Mil. R. Evid. 103(d) (emphasis added).

Lips' contends that the ground for the objection is clear from context of the question and that the objection properly preserved the issue for appeal. The District Court agrees and holds that the defense counsel's "objection

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[2] Not only did the military judge deny the defense counsel's objection, but he allowed the prosecutor to continue with this line of questioning. *See* Pet. at 8. In addition, the military judge failed to instruct the jury that it was not to consider the prosecutor's comments on Lips' post-arrest silence.

[3] Rule 103(a) also states the "standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces." Mil. R. Evid. 103(a).

made during cross-examination preserved the issue for review." Pet. at 17a.

To argue that the defense counsel's objection "was inadequate to preserve the *Doyle* issue for review" under Military Rule of Evidence 103 is disingenuous, especially where the reason for the objection is obvious from the text of the question asked and Rule 103(d) provides that an objection is not necessary if the error alleged "materially prejudice[s] substantial rights [of an accused] although they were not brought to the attention of the military judge." Mil. R. Evid. 103(d).

2. *Issue Raised on Appeal*

The government also argues that Lips failed "to present the question of the prosecutor's cross-examination as an issue on appeal to the Air Force Court of Military Review." Resp. at 12. In his Petition to the Air Force Court of Military Review, Lips raised the *Doyle* issue and argued that "[t]hrough cross-examination, and again several times during his argument on findings, trial counsel relied on a theory that commenting upon a failure of appellant to speak up prior to his trial is appropriate to impeach appellant, a theory unsupported by law. *Doyle v. United States*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)." *See* Pet. at 10 n.3. In addition, Lips discussed the types of questions the prosecutor asked on cross-examination, citing the record where the prosecutor "consistently utilized the attorney-client privilege to indicate that the appellant's version of the incident was somehow improperly withheld until trial . . . (R. 1235-42)." Pet. at 10 n.3.

Lips' counsel fully briefed the *Doyle* issue and the nature of the prosecutor's questions and closing arguments. In addition, the government's argument is contrary to the idea that appellate courts are to construe briefs liberally in determining issues presented on appeal. *See Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981) ("As a general rule, briefs are

read liberally with respect to ascertaining what issues are raised on appeal").

3. *Plain Error*

The government fails to address the District Court's finding that the prosecutor's comments on cross-examination denied Lips a fair trial and amounted to plain error.

As noted, the District Court holds that "even if the court did not find the issue preserved, it finds that under the plain error analysis, the continuous and repeated comment on [Lips'] post-arrest silence was 'obvious and substantial error that affected the fairness, integrity, or public reputation of judicial proceedings'." Pet. at 17a. In addition, the District Court holds that the prosecutor's comments were not harmless error. *Id.* at n.3, citing *United States v. Massey*, 687 F.2d 1348, 1353 (10 Cir. 1982) (discussing five factors relevant to determining whether prosecutorial comment on post-arrest silence is harmless).

The government argues that "[s]ince [Lips] has never established either 'cause' or 'actual prejudice' for his default [under *United States v. Frady*, 456 U.S. 152 (1982), Lips is] not entitled to raise the *Doyle* issue on collateral attack of his court-martial." *Id.* at 13. *See also Davis v. United States*, 411 U.S. 233 (1973); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (pretrial right to silence claim).

The defendants in *Frady*, *Davis*, and *Sykes* failed to object to the alleged error at trial and failed to raise the alleged error on appeal before presenting the issue on collateral attack. In addition, in each case the evidence of guilt is overwhelming and the error (1) did not go to the heart of the judicial process, (2) did not present an issue of constitutional dimension, and (3) did not result in a miscarriage of justice. The defendant in each case also had the benefit of review by civilian judges before seeking collateral review in the federal courts which Lips did not.

In the present case, the defense counsel (1) objected at trial to the prosecutor's comments on Lips' post-arrest

silence during cross-examination and (2) raised the *Doyle* errors on appeal. In addition, the evidence in Lips is extremely close,[4] the error goes to the heart of the judicial process and the core of Lips' defense, and it left the jurors with the impression that Lips' silence could be considered as evidence of his guilt.

F. Defense Initiated Inquiry into Defendant's Post-Arrest

The government also argues that Lips, "not the government, initiated the inquiry into his post-arrest silence during direct examination and renewed that inquiry on redirect examination." Resp. at 13. "Having raised the issue of his post-arrest silence and having given his explanation for it, [Lips] could not then deny the prosecutor an opportunity to probe the issue on cross-examination and address it during closing argument." *Id.* at 14.

In support of its argument, the government relies on *United States v. Pino*, 827 F.2d 1429 (10th Cir. 1987), *Lebowitz v. Wainwright*, 670 F.2d 974 (11th Cir. 1982), and *United States v. Robinson*, 485 U.S. 25, 32 (1988).

The District Court concludes that "*Pino* is clearly distinguishable on its facts and does not apply in this case." Pet. at 16a. *Lebowitz* and *Robinson* are also easily distinguishable. In *Lebowitz* a "Florida court ruled that the cross examination and comment on Lebowitz's silence during the execution of a search warrant was probative

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[4] The court believes that [Lips'] case, like *Johnson*[*v. Patterson*, 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973)], was mainly a test of credibility of the victim and the petitioner. In such a case, the prosecutor's impermissible comment on petitioner's post-arrest silence is even more damaging. In similar situations when juries have been presented with two versions of the same incident, it has been held "where the case comes down to a one-on-one situation, *i.e.* the word of the defendant against the word of a key prosecution witness, and there is no corroboration on either side, the importance of the defendant's credibility becomes so significant that prosecutorial error attacking the credibility cannot be considered harmless beyond a reasonable doubt." *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985). Pet. at 16a.

and thus did not constitute a violation of due process." *Lebowitz v. Wainwright*, 670 F.2d 974, 980 (11th Cir. 1982). Lips' case involves a rape in which the outcome turns on "the credibility of the victim and [Lips]." Pet. at 16a. The search and seizure situation presented in *Lebowitz* is totally different from a situation where the jury's decision depends on which of two versions of the same incident it finds believable.

Similarly, the prosecutor's sole comment in *Robinson* on the defendant's post-arrest silence in closing argument, made with the permission of the trial judge to respond to comments presented by the defense counsel in argument, is totally different from the present case where the prosecutor made more than 50 comments on Lips' post-arrest silence during cross-examination and in argument on findings and sentencing.

G. Specific Intent Evidence Problem

The government does not deny that prosecutor introduced specific intent evidence under Mil. R. Evid. 404(b) to prove the general intent offenses with which Lips' was charged.[5] Like the trial court in *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1948), the military judge in Lips's permitted the prosecutor to introduce evidence of plan, motive and intent to prove the same kind of general intent offense tried in *Lovely*. In *Lovely*, the Fourth Circuit held that the introduction of specific intent evidence was error in a general intent case where the outcome of the case turns on the credibility of the witnesses as it does in Lips' case. In the present case, Lips contends that the military court and the three military judges erred in permitting the introduction of specific intent evidence in the form of the

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[5] Nor does the government deny that the military judge failed to instruct the jury on the 404(b) evidence, or deny that the prosecutor introduced the 404(b) evidence "to rebut [Lips'] contention that Carite had initiated sadomasochistic sex between them" before Lips testified or it was clear that he was going to testify. Resp. at 15.

65-minute videotape and four sexually explicit magazines and that the introduction of the evidence rendered his trial fundamentally unfair. *See Arizona v. Fulminante*, 111 S.Ct. 1246, 1266-67 (1991) (J. Kennedy concurring in the judgment) ("Apart perhaps, from a videotape of the crime [or a videotape simulation of the crime], one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence").

CONCLUSION

For the reasons stated, Counsel for Petitioner Lips respectfully requests that the Supreme Court of the United States GRANT the petition for a writ of certiorari in the present case.[6]

Respectfully submitted,

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Date: January 12, 1994

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[6] The government argues that the Lips' case should not be held for *Weiss v. United States*, 113 S. Ct. 2412 (1993) (No. 92-1482) "because petitioner did not raise [the issues presented in *Weiss*] in the military courts, the district court, or the court of appeals" and hence "they are waived here." Resp. at 7-8 n.2. The issues presented in *Weiss* are jurisdictional (whether a court-martial is properly constituted) and can be raised by petitioner at any stage in the proceedings.

The purpose of the HOLD FOR WEISS (No. 92-1482) is to preserve the secrecy of the decision in *Weiss* until the Courts' decision is announced. Lips' contends that the issues in his case were not fully and fairly considered by the military judges serving on the Air Force Court of Military Review. If the Court denies Lips' petition for certiorari, the public can conclude the Court has decided that "the designation and selection of military judges satisfies the Appointments Clause" and that "due process [does not] require a fixed term of office for military judges." To protect the secrecy of the Court's decision in *Weiss*, Lips' should be held until *Weiss* is announced.